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On Human Rights and Structural Justice

A dissertation submitted in partial fulfillment  
of the requirements for the degree of  
Doctor of Philosophy in Philosophy

by

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July 2021  
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This dissertation is approved for recommendation to the Graduate Council.

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## **Abstract**

The rights literature is full of accounts of rights, and each captures important aspects of the nature and function of rights. But none of the leading theories offers a comprehensive account of the nature and function of rights that both stands up under the pressure of counterexamples and can buck accusations of internal inconsistency.

In this paper I embrace much of Nicholas Wolterstorff's work on justice and the relation of human rights to worth, and I propose changes to his account in order to strengthen it. I evoke the works of Johan Galtung, Richard Rubenstein, and Elizabeth Anderson in order to equip my "Wolterstorffian" account with the ability to address structural injustice, structural violence, and concentrated disadvantage. I offer that human rights (morally legitimate claims) supervene on human worth and facts of the matter about that which is good for things like us, and I argue that this supervenience of rights on worth is best understood as indexed to particular socio-moral contexts. Human worth is inalienable, and from socio-moral context to socio-moral context our morally legitimate claims may vary based on the details of the socio-moral context we find ourselves in. All of the preceding will be controversial--far more controversial than the claims "humans have value," "humans are morally considerable," or "humans have rights."

Toward the latter part of my paper, I take an applied turn. I offer that if consensus cannot be reached on why, exactly, humans are valuable or what, exactly, rights are, then what is needed is a "Rawlsian maneuver" with which we can lean forward into territory that enjoys relative consensus: that humans have rights (whatever those are and for whatever reason they are had). From that place of relative consensus (humans have rights) I apply my "Wolterstorffian" account of rights and justice to the area of anti-Black racism in the American context. The application of my account to sins like slavery, various Jim Crow policies, and contemporary structural racism or direct racial violence demonstrates the moral legitimacy of two different (in kind) sets of claims to race reparations. The first set of morally legitimate claims to race reparations will include claims to compensation for past wrongs, in the sense of

corrections for damages, back-pay for stolen labor, or compensation for stolen life. The second set of morally legitimate claims to race reparations will include claims to structural reform and the disruption of protracted anti-Black structural violence, in the sense of affirmative action policies, police and education reform, and the disruption of inequitable distributions of power.

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## **Dedication**

This work is dedicated to my mom, Becky, my dad, John, and my brother, Chris. Over and over again, they convinced me to finish it, but would have been proud anyway if I hadn't.

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## Introduction

In the latter half of the 20<sup>th</sup> century, most of the world's nations committed themselves to the United Nations's Universal Declaration of Human Rights.<sup>1</sup> These global commitments ushered in progress in international child labor laws and child soldiering laws, they elevated the recognized status and social situation of women, and they provided a moral framework for multilateral condemnations of genocide, Apartheid, war crimes, etc. The Declaration was a momentous event of global political significance. In the last quarter-century, however, global powers have lessened their commitments to the Declaration of Human Rights. The Trump Administration, in particular, recently went so far as to announce that the United States would no longer be a member of the global human rights council.<sup>2</sup> This back-pedaling is an alarming change in how the nations of the world formally conceive of their political and moral obligations toward vulnerable people, and it is already accompanied by weakening assurances that individuals' rights will be maintained and championed by nation-states in a human rights-sensitive global order.<sup>3</sup>

In the context of this shifting international moral framework, I will offer an understanding of *justice* that is anchored to a robust inherent human rights framework. I will offer a notion of a normatively forceful human right that is ultimately reducible to talk of proper respect for human worth, and my concept of justice will sit atop that understanding of human rights. In the American public sphere, reasonable and passionate dialogue is taking place regarding progress and regression in American race relations—engaging conversations about history, considerations of our political duties to one another and to the State, considerations of the State's duties to the historically wronged, policy conversations about affirmative action and

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<sup>1</sup> United Nations, "Universal Declaration."

<sup>2</sup> Lee and Lederman, "Trump Administration Pulls."

<sup>3</sup> See the Syrian refugee crisis (Reid, "Refugee Crisis"), the migrant crisis at the US-Mexico border (Jervis et al., "The Migrants"), crises of ethnic cleansing in Myanmar among the Rohingya Muslims (Albert and Maizland, "Rohingya Crisis"), and the lack of international political will to reassert the conditions of peace in these various situations.

reparations, etc. I want to contribute to that interdisciplinary conversation an understanding of *justice* according to which justice is grounded in proper respect for the tremendous worth of human beings and I will present the implications my model of justice will have in those other applied domains: that Black Americans have morally legitimate claims to race reparations of two different varieties, one a claim to direct compensation for past wrongs and the other a claim to structural reform. I call mine a *rights-first theory of justice*.

My work will pursue answers to, and will be guided by, two primary questions:

Q1.        *What is justice?*

and, as an application of (1),

Q2.        *What are the requirements of justice with regard to Black Americans today, in light of historical wrongs?*

I will explore some of the implications of my rights-first framework of justice in the domain of American anti-Black racism, answering the question: *What are the requirements of justice?* within that particular context in order to illuminate the kinds of demands that my model of justice places on contemporary moral agents in the light of the kinds of injustices that there have been and currently are in our world. I will explore the relation of the immense worth of rights-holders to the systems, structures, and institutions in which rights-holders are located.

I will make the case that justice is ultimately conceivable in terms of proper respect for human worth, by which I will just mean:

- *a rights-holder's worth is properly respected if and only if both the rights-holder is treated in those ways of being treated to which she has morally legitimate claim and the rights-holder is granted those goods to which she has morally legitimate claim.*

The core claim of my theory of justice is:

- a state of affairs is '*just*' in which every rights-holder gets that to which they have morally legitimate claim, and in which no rights-holder is treated in ways that demean them.

Defined as such, I will think of *justice* as an ideal state of affairs to which we ought to aspire, with the understanding that *justice* cannot be instantiated in our world at scale. No global state of affairs in the real world will actualize *justice*, because

- In no global state of affairs in the real world will it be the case that each rights-holder gets *all* of that to which she has morally legitimate claim, and because
- In all global states of affairs in the real world there will, of course, be at least one rights-holder who is treated in a way that demeans them (that is, in a way that fails to respect their worth).

A conjunction of my definition of justice, certain facts about human nature, and facts about the limited availability of resources that are crucial to human well-being will make it clear that under this definition of justice we should not expect the ideal *justice* to be actualizable at the scale of nation or society.

However, I do believe that *particular relationships* can be accurately characterized as *just*. That is, while I do not believe *justice* is actualizable in this world on a broad scale, I do believe that a relationship between two particular moral agents, or a relationship between a particular rights-holder and the State or some other institution, *can* be properly characterized as just. Each such particular relationship will be characterized as just in virtue of the particular rights-holders receiving that to which they have morally legitimate claim and in virtue of the fact that the person or institution to which they are socially situated is not treating them in a way that disrespects them or their worth. So while my theory of justice will not allow me to characterize global states of affairs as actually just, it will allow me to characterize *local* relationships and states of affairs as actually just, and it will provide an ideal to which we as political creatures—members of global systems and institutions—may aspire. The ideal *justice* should be taken to

elucidate what, exactly, has gone wrong in a given instance of injustice, and it will follow from a conception of justice that is ultimately grounded in human worth and inherent human rights that any correction of injustice will take as its aim a proper respect for the worth of those affected moral patients.

Because we cannot reasonably expect to attain to the *just society*, in which all human worth is respected, we must move the goalposts and make our aspiration the *justly structured society*, in which some human worth is inevitably disrespected but with guardrails in place to right existing wrongs. Pursuit of the ideal will be inevitably frustrated, but the ideal *justice* should inform us as we ask, for instance, “*What are the requirements of justice with regard to Black Americans today, in light of historical wrongs?*” We should deal with the world and with our own moral and societal limitations as they present themselves to us. We may certainly think about and discuss the ideal *justice* in meaningful ways in theoretical spaces and, as I have said, at some levels of social interaction in the real world justice *is* instantiated (as when one person appropriately respects the worth of another person); but as we think about the whole world and of entire societies, I join the pragmatic theorist in theorizing about the world as it is—perpetually riddled through with some disrespect or another for human worth. So my project makes its goal the *justly structured society*.

We can evaluate states of affairs in terms of justice and injustice at an even more granular level than that of the relationship between two particular moral agents—we can evaluate a state of affairs in terms of justice and injustice at the level of the *particular rights and duties* that obtain between a moral patient and moral agent. Indeed, this is the context in which talk of rights is most familiar, in the context of the *particular* moral entities (*particular* rights) that obtain between a moral agent and patient (whether we are speaking of individuals, groups, or the State). After all, the moral relationship between a moral agent and patient is a complex of rights and duties, and there is a manifold of ways in which one could treat a single person both justly and unjustly at any given time. We could conceive of, for instance, a parent meeting his or

her obligation to his or her child with regard to the provision of food and shelter, yet the parent failing in some other respect, as in with regard to emotional support or in-home education. Such a relation of a parent to his or her child could be evaluated to be just along some dimensions (i.e., in accord with the requirements of certain rights) but unjust along others (i.e., not in accord with the requirements of other rights). That the justice or injustice of states of affairs can be evaluated along a spectrum of fine-grained analysis to coarse-grained analysis complicates things, but everyday experience indicates that the domains of justice and the moral relations we stand in to others are in fact deeply complicated.

I set my account of justice atop a robust and realist take on human worth and rights. Without having yet argued for anything, here is a preview of my account of *rights*: broadly endorsing Nicholas Wolterstorff's work,<sup>4</sup> I will conceive of human rights as the morally legitimate *claims* that human beings make on one another (and on the State, organizations, institutions, etc.), the moral legitimacy of which is established by their having the requisite kind of worth. In much of the rights literature, rights and claims are separate entities (see Hohfeld's framework, which I cover in Chapter 1). But here, I have just identified rights with morally legitimate claims in a way that may give pause. I insist on that identity and not for merely semantic reasons. It is my view that our rights *just are* the morally legitimate claims that we have against one another; in the case of animals, the unconscious, the very young, and potentially other sorts of beings that *cannot exercise a claim*, the claims are to be made and enforced by guardians or governments on the claimant's behalf. There are distinctions to be made here between

- i. rights themselves (or claims themselves),
- ii. the act of claiming, and
- iii. that which is claimed,

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<sup>4</sup> Wolterstorff, "*Rights and Wrongs*."

but, in my view, that to which we have a right and that to which we have legitimate claim are identical. And of course, the verbal “to claim” has no equivalent in “rights” locutions. (“To right” is nonsensical.)

So, I hold to the identity of rights as claims and what I mean when I say “I have the right to perform activity *X* or the right to good or treatment *Y*” is just that “I have the morally legitimate claim against another to their treating me in ways consistent with my performing activity *X* or attaining good or treatment *Y*.” It is in *that* sense that I mean that our rights *just are* our morally legitimate claims. There is nothing *morally* substantive to rights above and beyond the claims themselves. Later, I will offer that rights are “normatively binding social relations” à la Wolterstorff and perhaps one will insist that, surely, *claims* and *normatively binding social relations* are not the same thing! So here I will grant a potential caveat: if “rights” refers to anything that “claims” obviously does not, it is the *social relation* that obtains between two rights-holders. Under that view, which I am happy to entertain for the sake of getting on with things, a *right* would be a conjunction of two elements: the social relation that obtains between two rights-holders and the morally legitimate claim of one rights-holder against the other. Thus, rights as social-relation-plus-claim (which echoes Wolterstorff’s *rights as normatively binding social relations*). That is not my preferred way of carving up this space conceptually, though, because another of my commitments is that every rights-holder is necessarily socially situated, so the claims made by rights-holders always occur in social situations and in tandem with particular social relations. Claims are intrinsically social things—they are a claim of one *against another*. So, while I do not think it is nonsense to insist on some conceptual space between the notion of a right and the notion of a claim (*rights as social-relation-plus-claim*, for instance), I hold that it is the case that every instance of a human right is an instance of an intrinsically social claim (or set of claims). When we point to (intrinsically social) morally legitimate claims, we also point to rights; when we point to rights, we also point to (intrinsically social) morally legitimate claims.

All of that to say: while I understand the desire for a rigid distinction between the notion of a claim and the notion of a right, and while I am willing to entertain such a distinction, my notion of claims as being intrinsically social shows this more complicated notion of a right (*right as social relation plus claim*) to be redundant. Under my view, rights *are* social-relations-plus-claims, but they are such because claims are intrinsically social things (because rights-holders and those who bear corollary duties are necessarily socially situated), not because we need to add something to the picture to distinguish between rights and claims. Were one not socially situated in any sense (that is, were one in no relation whatsoever to any other moral agent, state, institution, etc.), the necessary preconditions for having rights and making claims would fail to obtain; but as I have indicated and will indicate, nobody is “not socially situated in any sense.” Moral agents are necessarily socially situated; claims are intrinsically social. My preferred locution is *rights are claims*, and I am happy to grant all the Hohfeldian incidents entailed by the Hohfeldian notion of a “claim,” as he characterized claims.

These morally legitimate claims have normative force in virtue of the objective worth of human beings and it is their *worth* that makes rights-holders morally and normatively salient. It is our worth that makes our morally legitimate claims against others normatively forceful; respect for that worth *just is* a moral agent’s granting to the rights-holder those behaviors and goods to which the rights-holder has legitimate claim. Our rights are socio-moral properties that we have in particular social contexts as a function of both the kind of thing we are (human) and the life-goods that objectively safeguard our well-being; rights supervene on worth in individuated socio-moral contexts, and human worth supervenes on the fact of rights-holders’ humanity.<sup>5</sup> And *justice* or *injustice* sit atop all of it.

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<sup>5</sup> In Chapter 3, I clarify that “the fact of a rights-holder’s humanity” is just whatever non-value essential property or set of non-value essential properties or status it is on which human worth supervenes and is universal to every human. Human worth sits in a modal relation atop this fundamental and essential property of humans: *humanity*. I conceive of human worth as supervening on *humanity*, but one is free to adopt their own view regarding whether human worth *inheres in* humanity, or is *grounded in* humanity, or somehow *reduces to* humanity. I will offer that human worth supervenes atop the essential property

The justly structured society can be described in these general terms: when society is justly structured, there are mechanisms in place for the correction of injustices and wrongs, though even justly structured societies should not be expected to fully actualize *justice*. To be finer-grained, *the justly structured society will be conceived of as that society which is structured:*

- i. *in such a way that it is possible to render to persons all of that to which they have morally legitimate claim by other members in the moral community,*
- ii. *in such a way that the State and other public institutions render to persons all that they owe to them, and*
- iii. *in such a way that persons are protected by enforceable laws from actions of others who would demean them or withhold from them their right.*

Even in those justly structured societies, there will be *wrongs* that need to be addressed, and there will be *avoidable deficits of mental and somatic realizations* that needs to be resolved.<sup>6</sup> Condition (i) is a necessary condition of the justly structured society because in order for a society to be justly structured it is necessary that the systems, institutions, distributions of resources, and founding documents of that society are not such that they actively preclude the fulfillment of the morally legitimate claims that obtain between rights-holders. I include (ii) as a necessary condition of the justly structured society because a society in which the *State itself* does not fulfill its morally legitimate duties to the rights-holders over which it is sovereign could hardly be conceived of as justly structured. And (iii) is a necessary condition of the justly structured society because there are at least some cases in which a rights-holder's rights are violated in which the State should step in to right the wrong (as in a case of murder, or child abuse), alleviate the suffering caused, and bring the wrongdoer to justice.

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*humanity* and is a non-natural property such that beings that are *human* have human worth and such that beings that are not *human* lack human worth.

<sup>6</sup> The distinction between *avoidable* and *unavoidable deficits* is one subject of Chapter Four.



Needed, too, will be some talk of the kind of deficits of realizations that are *acceptable* in a given justly structured society, so as to adjudge (in a given justly structured society) what quantity of violence or injustice meets an accepted threshold for state intervention to which the justly structured state must adhere. My intuition here is that we want neither a nanny State nor an absentee parent State, and in my discussion of the justly structured society I will owe the reader principles for state intervention in instances of injustice that establish that sweet spot of morally legitimate state intervention. And in an application of my broadly Wolterstorffian account of justice to our particular social context, I will show that my accounts of the nature of human rights, justice, structural justice, and structural violence jointly entail the payment of race reparations to African Americans in two forms.<sup>7</sup>

For now, I talk of rights and justice *simpliciter*, but toward the end of my work I will take an applied turn and talk of justice and its demands in terms of the structural anti-Black racism that persists today in the modern American socio-moral context. In the following, I endorse much of Nicholas Wolterstorff's work on justice and rights, which appeals to human rights and worth at the bottom. I challenge Wolterstorff's account where necessary, shore it up where necessary, and provide alternative ways forward within his work where necessary. In the first chapter, I offer a survey of the broader rights terrain, so as to

- i. demonstrate that a Wolterstorffian presentation of inherent human rights as being morally legitimate *claims* is a viable take on rights, and
- ii. demonstrate that "rights" serve as a suitable foundation for a broadly Wolterstorffian account of justice.

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<sup>7</sup> Of course, my view, when applied to other historically marginalized groups, will entail much the same as regards those groups.

Getting rights *right* is foundational to my rights-first theory of justice and it will help me to answer questions later in this work about that which is owed (and why) to those who are wronged or those who are descendants of those who were wronged.

In the second chapter, I will present and critique Wolterstorff's conception of justice, which is grounded on rights and human worth. I will show how the foundation of his account, in which he ultimately appeals to claims about our relatedness to God, is internally inconsistent with other claims of his. In the third chapter, I will offer alternatives to the foundation of Wolterstorff's account, some theistic and some secular; I like the framework of Wolterstorff's take on rights as normatively binding social relations and his appeals to human worth and in Chapter 3 I do my best to save it. In the fourth chapter, I incorporate the work of peace theorists Richard Rubenstein and Johan Galtung in order to develop sensible notions of structural justice and the justly structured society, and in order to establish reasonable grounds for when the State should and should not intervene in the private affairs of citizens in the justly structured society—both in cases where a rights-holder's rights have been violated and cases where rights-holders are simply subject to *unacceptable* suffering. And, finally, in Chapter 5 I will explore the question of what, exactly, is owed to individuals or groups whose status is currently and historically that of *wronged*; with an eye to race relations I will present two different categories of morally legitimate claims to race reparations, and show how they follow from the accounts of human worth, normatively binding social relations, justice, and the justly structured society that were developed in preceding chapters.

## Chapter 1: Surveying Rights

### A. Hohfeld and the Structure of Rights

Let's begin with an exploration of the nature of all of those normative entities that have been called "rights." In my account of justice, I will give special attention to our moral relations to other individuals, systems, and institutions, and in the Introduction I stipulated that those moral relations *just are* our human rights.<sup>8</sup> The various rights-theories presented in this chapter are attempts at capturing the nature of all different sorts of rights, but my focus will be inherent human rights. The following accounts, some of them descriptive and some of them functionalist, present rights differently: from rights as controls over another's freedom, to rights as securing one's interests and life-goods, to rights as sovereignty over another's duties with regard to one, to rights as performing several functions (not merely as securing one's interests and not merely as controlling another's duties with regard to one), to rights as reasonable demands derived from law or contract or moral principles, and to rights as being fundamentally claims. *My* account, which will be presented in detail in Chapter 2, takes rights to be highly socially contextualized, normatively binding claims, and I take rights to be moral entities that supervene on our human worth. I am open to accounts of human worth that either account for human worth by appeal to natural properties or capacities or that take rights and human worth to be moral properties that are irreducible to natural properties—but both of these types of accounts will run into problems<sup>9</sup>. (More on human worth later, following this chapter's survey of the high points of the rights literature.)

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<sup>8</sup> I do not deny the more standard Hohfeldian view (to be covered in this chapter) that rights are sometimes complex moral entities that include claims, liberties, powers, and immunities jointly and in different combinations. I accept that claims (at least sometimes) logically entail other entities like liberties, powers, and immunities, and vice versa, I insist that every liberty, power, and immunity entails a claim or set of claims. But I speak of rights in terms of claims and prioritize this claim-language more generally because claims best account for notions like normativity, indebtedness, reparations, etc. I do not intend to eliminate the notions "liberty," "power," or "immunity." But it is claims and rights-as-claims that are best suited for accounting for the relations between humanity, human worth, human rights, and justice that I will lay out in coming chapters.

<sup>9</sup> The former runs aground on the problem of counterexamples—for every grounding property/capacity offered, we can imagine a rights-holder lacking that property or capacity. And the latter runs aground on

Wesley Hohfeld's descriptive analysis of rights has become a standard presentation of the various forms that rights take.<sup>10</sup> Within the Hohfeldian system, there are four different (what he calls) "incidents"—privileges, powers, claims, and immunities—each of which independently from the others is a form that some rights take, each of which conceptually entails its complements, and which can jointly form what Leif Wenar calls "complex molecular rights."<sup>11</sup> The idea is supposed to be that some rights are singularly claims or singularly immunities, but at least some of our rights are a combination of multiple such "incidents." Wenar places the four Hohfeldian incidents on a quadrant (Figure 1 below), with the incidents on the top of the quadrant (powers and immunities) considered representative of a second-order of moral entities, and the incidents on the bottom of the quadrant (privileges and claims) considered representative of a first-order of moral entities. The first- and second-order incidents on the left of the quadrant (privileges and powers) are to be conceived of as "active" moral entities and the first- and second-order incidents to the right of the quadrant (claims and immunities) are to be conceived of as "passive" moral entities, *à la* Lyons.<sup>12</sup> The active "incidents" are discretionary—by an act of will one may choose whether or not to exercise these sorts of rights, and one may alter one's rights. The passive "incidents" are nondiscretionary—claims and immunities stand prior to an act of will by the rights-holder to activate them (unless the rights-holder has waived his or her rightful claim against another).

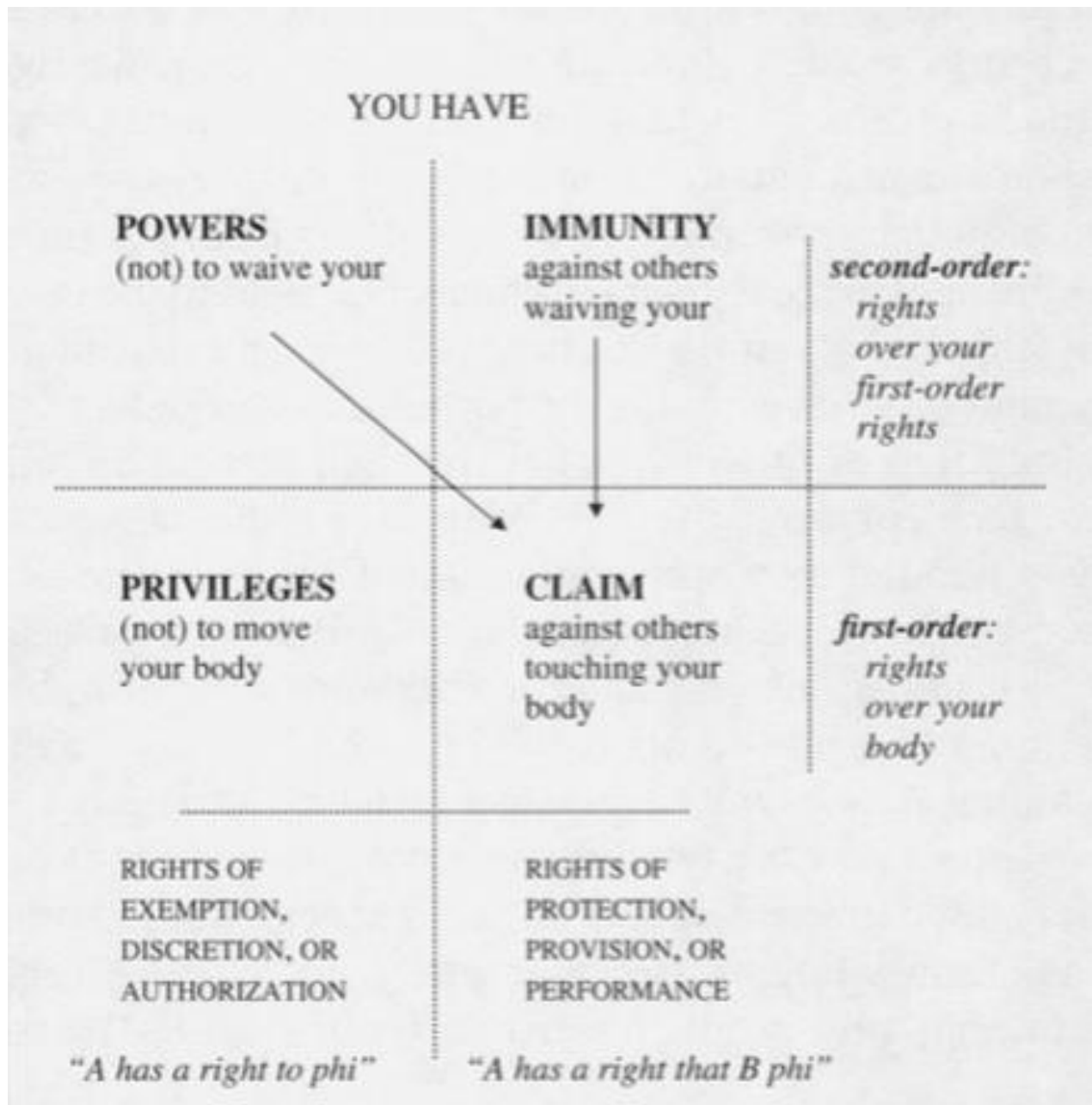
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the general problem facing non-naturalism—*what are* moral properties if they are not reducible to talk of natural properties? Legitimate counterexamples damn any account that appeals to alienable natural properties. And I am not bothered by the *weirdness* of saying that moral properties like human worth are irreducible to natural (physical) properties.

<sup>10</sup> Hohfeld, *Legal Conceptions*.

<sup>11</sup> Wenar, "Nature of Rights."

<sup>12</sup> Lyons, "Correlativity."



**FIGURE 1:** Wenar's figure for "A Complex Molecular Right."<sup>13</sup>

Hohfeld's quadripartite analysis of rights is important in the literature of rights-talk, because it is taken to be a comprehensive inventory of the constitutive parts of the moral relations we stand in to others. Hohfeld's analysis of the forms that rights take is purportedly comprehensive, but it is important to note that it stops short of the work that must be done to *account for rights*; Hohfeld gets at how rights and their constitutive incidents are structured, but

<sup>13</sup> Wenar, "Nature," 233.

he does not get any deeper than that. He does not tell us what rights are, why they are normatively forceful, what grounds them or serves as their base, what makes their violation *actually wrong*, etc. This talk of Hohfeldian “incidents” needs to be set atop a more fundamental analysis of the nature of rights, beyond just the various forms they may take. I hope to contribute to that latter effort.

As you can see in Figure 1, Hohfeld calls first-order discretionary rights “privileges.” A paradigm example offered is the privilege-right to freely move your body (or not), or one’s privilege-right to walk across the park. Hohfeld calls first-order passive rights “claims.” A paradigm example offered is the claim-right against others touching or harming your body, or the claim-right to food and water. Hohfeld calls second-order discretionary rights “powers.” A paradigm example offered is the power-right to waive (or not) your claim-right against others not to touch or abuse your body, or a military officer’s power-right to confer on a subordinate some new duty. Hohfeld calls second-order passive rights “immunities.” A paradigm example offered is one’s immunity-right against another to their waiving one’s claim-right against them not to touch or abuse one’s body, or one’s immunity-rights against the State to alter one’s right to free expression. The second-order incidents (powers and immunities) are understood to be rules governing the first-order incidents, and the first-order incidents (privileges and claims) are understood to be rules directly governing the behavior of moral agents. In the figure, you see that powers are thought to be “over” our claims—we have the power to waive (or not) our claims. Similarly, our immunities are “against” others to their waiving our claims.

Hart recasts Hohfeld’s taxonomy of rights into “primary” and “secondary” rules—the primary rules being the privileges and claims that directly govern our behavior and the secondary rules being superseding principles that lay out how rights-holders can alter their privileges and claims.<sup>14</sup> One can use one’s power-rights to waive one’s claim-rights against another to certain treatment, but otherwise one’s claim-right against another to certain treatment

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<sup>14</sup> Hart, *Concept of Law*.

is immutable. One's power-rights are one's alone, as one's immunity-rights protect one from somebody else waiving or altering one's claim-rights in a morally legitimate way. And, barring a case in which one's privilege-rights are legitimately revoked (as in when one breaks the law and must face imprisonment), one's privilege-rights to act or move however one wishes are one's to exercise at one's discretion. Wenar summarizes the Hohfeldian analysis and its distinctions:

The first- and second-order distinction corresponds to Hart's division between primary and secondary rules. First-order rights specify how agents may, must, or must not conduct themselves. A citizen's right to march in protest, or a citizen's right that the police protect her while she marches, are first-order rights. Second-order rights define authority: these rights specify who can, and who cannot, change facts about how agents may, must, or must not conduct themselves... The other distinction is between active and passive rights. Active rights are rights to do (or not do) some thing. So you have an active right to walk the highlands of Scotland, and an active right to bequeath your estate to your children. Passive rights are rights that *others* do (or not do) some thing. You have a passive right that your university pay you your wages and a passive right that the state not require you to tithe to a church. Your active rights concern your own permissions and powers. Your passive rights concern the permissions and powers of others.<sup>15</sup>

Hohfeld's model of how rights are structured is widely accepted, and I accept the conceptual and logical entailment relations between claims, liberties, powers, and immunities that he and Wenar endorse. In my account of rights, though, I present a simpler conceptual space—I hold that we can conceive of rights as being, simply, claims. I accept Hohfeld's framework that paints rights as “complex molecules,” some of which might be jointly claim and immunity and others of which might be jointly privilege and claim, and I accept that claims stand in logical entailment relations to liberties, powers, and immunities; *vice versa* I hold that each liberty, power, and immunity entails a claim or set of claims. Granting all of that, I give the “claim” aspect of rights priority. Put simply, it is claims that are doing all the moral work. My broader account of justice takes rights-holders to be intrinsically socially situated and sets rights-holders into normatively binding social relations, the key ingredient of which is the various claims (and their correlative duties) we have against our moral interlocutors to particular life-

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<sup>15</sup> Wenar, “What We Owe,” 376.

goods or treatment.<sup>16</sup> My account is not an attempt to eliminate the other moral incidents—I accept Hohfeld’s account of the structure and relatedness of the four moral incidents, and I accept that each of the rights to which I refer (morally legitimate claims, as I call them) is either a Hohfeldian claim *simpliciter* or a complex molecule of a Hohfeldian *claim* and the other moral incidents Hohfeld takes claims to entail. I embrace conceiving of our human rights in terms of *claims*, because each socio-moral relation includes a morally legitimate claim or set of morally legitimate claims to certain life-goods (literal goods, or ways of being treated). Those claims and their corollary duties *just are* the normative relations that hold between two rights-holders. So: every human right is, at least in part, a morally legitimate claim to a particular life-good (a literal good like food or medical treatment, or a way of being treated)—whether that right is a claim, *simpliciter*, or a complex molecular right a constituent part of which is a claim. In my use of the word “claim,” which will be how that term is used throughout this paper, each of the Hohfeldian categories is a moral incident that, in practice, is *claimed*; it is the claim and claiming that give real-world moral salience to the privileges, powers, and immunities that constitute the rest of Hohfeld’s theoretical space.

In my Wolterstorffian view of rights,<sup>17</sup> we are set in deeply complicated webs of normatively binding social relations to others, and our human rights just are these normatively binding relations—the socially contextualized claims we make on others (and the claims of others against us) to certain life-goods according to our ineradicable worth. Conceiving of rights as claims is a good way to make sense of our moral intuitions pertaining to that which is *due* to rights-holders, and it is a good way to make sense of notions like a moral agent’s being *wronged*, their being *owed* in light of that wrong, their being *unjustly withheld goods*, and the

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<sup>16</sup> Put another way: my giving the “claim” aspect of rights priority isn’t a metaphysically or ontologically significant move—claims and their complementary incidents are, *à la* Hohfeld, at the same “level” of ontological significance.

<sup>17</sup> “Wolterstorffian,” in the sense that my view is in the spirit and style of Wolterstorff. You will see that I break from Wolterstorff in sometimes trivial ways and in sometimes significant ways. But I maintain, throughout, that the general structure of his account should be held intact.



injustices committed against them as being instances of disrespect for their worth and the life-goods that are their *due* in virtue of that worth. A theory of human rights that conceives of rights as being essentially claims to certain goods and treatments and that conceives of those rights as being normatively forceful in virtue of human worth enables us to explain that what it means that one has been *wronged* is that one's worth has been disrespected and that the goods and treatment to which one has legitimate claim have been withheld.<sup>18</sup>

I am not alone in emphasizing the conceptual link between rights and claims. Later, I endorse Wolterstorff's account of rights as being claims.<sup>19</sup> But Joel Feinberg and Glanville Williams emphasize the relation between right and claim, and between right and "that which can be insisted on":

To have a right is to have a claim against someone whose recognition as valid is called for by some set of governing rules or moral principles. To have a claim in turn, is to have a case meriting consideration, that is, to have reasons or grounds that put one in a position to engage in performative and propositional claiming. The activity of claiming, finally, as much as any other thing, makes for self-respect and respect for others, gives a sense to the notion of personal dignity.<sup>20</sup>

A right is something a man can stand on, something that can be demanded or insisted upon without embarrassment or shame.<sup>21</sup>

"Right" conjures up the idea of something that can be insisted on, whereas a liberty is purely a negative expression. A right exists where there is a positive law on the subject; a liberty where there is no law against it. A right is correlative to a duty in another, while a liberty is not.<sup>22</sup>

Neither Williams nor Feinberg, here, explicitly identifies rights with claims, but Feinberg, at least, reduces rights to talk of claims. Feinberg takes having a claim to be having reasons or grounds appropriate for making a claim, and he equates one's status as a rights-holder with one's having

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<sup>18</sup> The relationship between human worth and human rights will be explored in detail in Chapter 3, with appeal to moral non-naturalism and the claims that

i) facts about human worth do not reduce neatly to physical facts or non-moral natural facts, and  
ii) the human worth on which human rights supervene *itself* supervenes on the fundamental and essential (natural) property, *humanity*.

<sup>19</sup> Wolterstorff, *Rights and Wrongs*.

<sup>20</sup> Feinberg, "Nature and Value," 257.

<sup>21</sup> Feinberg, *Social Philosophy*, 58—59.

<sup>22</sup> Williams, "Legal Liberty," 1142.

reasonable demands to make of others. Within his theory of rights as things to be insisted on or demanded, Feinberg includes “manifesto rights,” rights that should be conferred but are not yet (like the right to healthcare).<sup>23</sup> Feinberg’s core position is that rights are claims that are validated by governing rules or principles. Williams does not explicitly talk of claims, but he rejects the identification of rights with liberties, and he rejects that liberties have correlative duties. I take Williams’s “something that can be insisted on” to be referring to claims (that have correlative duties), and like Feinberg, Williams insists on a relation between rights and positive laws or principles. I will not ultimately agree with Williams that rights are derived from positive laws (at least, not in cases of inherent human rights), but I agree with his take on rights as “something that can be insisted on.” This language of “insistence” evinces notions of morally legitimate claim.<sup>24</sup>

Beyond Hohfeld’s descriptive analysis of rights, the rights terrain is a complicated patchwork of schools of thought. Mill, Raz, Kramer, and MacCormick are all exemplars of the *interest theory of rights*.<sup>25</sup> Kant and Hart are exemplars of the *will theory of rights*.<sup>26</sup> Feinberg, Skorupski, and Darwall are all exemplars of *demand theories of rights*, a third way alternative to the traditional *interest theory of rights* vs. *will theory of rights* debate.<sup>27</sup> Others offer accounts that attempt to merge traditional interest theories with traditional will theories.<sup>28</sup>

Still others, like Rawls and Scanlon, offer rights from within their unique varieties of contractualism—rights as deriving from principles that moral agents agree to, and rights as

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<sup>23</sup> Feinberg, *Social Philosophy*.

<sup>24</sup> Clearly, some rights-holders *cannot* insist on that to which they have claim—animals, the very young, the disabled, etc. However, a surrogate or guardian or government could insist on their claim. I am not here to defend Williams, per se, but it might be enough for his account that a right is a thing that could possibly be insisted on, regardless of whether it is actually insisted on. The right could conceivably obtain, then, whether or not the rights-holder can or does insist on it.

<sup>25</sup> See Mill, *On Liberty*; Raz, “Nature of Rights”; Kramer, “Getting Rights Right”; and MacCormick, “Children’s Rights.”

<sup>26</sup> See Kant, *Critique* and Hart, *Concept of Law and Essays on Bentham*.

<sup>27</sup> See Feinberg, “Nature and Value”; Skorupski, *Domain of Reasons*; and Darwall, *Standpoint and “Precis.”*

<sup>28</sup> See Wenar, “Nature of Rights” and Sreenivasan, “Hybrid Theory” and “Duties.”

manifesting as constraints on the discretion of individuals or institutions to act.<sup>29</sup> Wolterstorff dismisses extensive interaction with Rawls's work as directly relevant to his project of explaining *what rights are*:

A few paragraphs back I mentioned John Rawls. Such is the fame of John Rawls's *Theory of Justice* that almost everyone who picks up this book will want to know what I have to say about Rawls. Apart from incidental comments, I do not have anything to say about Rawls. The reason for my silence is straightforward. Though Rawls's theory of justice is an inherent natural rights theory, he does nothing at all to develop an account of such rights. He simply assumes their existence. My interlocutors will be those who do not just appeal to such rights but have something to say about them.<sup>30</sup>

### B. Functionalist Accounts of Rights

In his functionalist analysis of rights, Leif Wenar highlights the traditional divide in the rights literature, that of the debate between *will theorists of rights* and *interest theorists of rights*.<sup>31</sup> Wenar argues that each school of thought illuminates different but incomplete aspects of a truly comprehensive and unified theory of rights, and that neither by itself provides an adequate accounting for all of our intuitions about rights. Each school of thought takes rights to perform a singular function. Interest theorists take rights to perform the function of securing and guaranteeing the interests or the good of rights-holders, while will theorists take our rights to be tied closely to our capacities for autonomy and to carve out spheres in which we exercise morally legitimate authority over others' duties regarding us. In interest theories rights secure our interests, while in will theories rights make us sovereigns over another's duty.

Wenar provides this short summary of the core difference between the two traditional schools of thought:

There are two traditional analyses of rights. For Will theories, the function of rights is to give right-holders choices. According to the Will Theory, a promise creates a right because the promisee can then waive, or demand, the performance of the promissory duty. Interest theories hold that rights further the

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<sup>29</sup> These contractualist accounts are most precisely accounts of how rights come to be agreed upon, or how they arise, and they do not stand necessarily in contradiction to an account of the nature of rights. See Rawls, *Justice as Fairness* and Scanlon, *Difficulty* and "Reply."

<sup>30</sup> Wolterstorff, *Rights and Wrongs*, 15.

<sup>31</sup> Wenar, "Nature of Rights."

right-holders' interests. According to the Interest Theory, property is a right because ownership makes people's lives go better.<sup>32</sup>

Wenar uses a promissory's duty as an example of how will theories work, and he uses property rights as an example of how interest theories work; neither example is meant to demonstrate the full scope of its respective theory of rights. Wenar's own position, ultimately, is that neither a will theory nor an interest theory by itself gives us a list of rights that is exhaustive of all the normative relations we consider to be rights—will theories, for instance, fail to account for such rights as those of infants or the incapacitated (who lack necessary autonomy- or rationality-related capacities), and interest theories fail to account for the rights one may have that are not necessarily related to one's own interests (as in, a judge's right to commute a sentence).

This inability of either camp by itself to account for at least some rights that are prominent in our moral reasoning positions Wenar to offer an account of rights that includes both camps. In Wenar's words:

The long and unresolved historical contest between these two single-function theories stretches back through Bentham (an interest theorist) and Kant (a will theorist) into the Dark Ages. In the twentieth century the scholarly contest between advocates of the two theories ended in stalemate. I believe that, as is often the case with unresolved historical debates, this situation is explained by each side giving a partial account of a larger terrain.<sup>33</sup>

The will theory captures rights that give discretion to the rightholder without conferring benefits, but fails to capture rights that confer benefits without giving discretion. The interest theory accepts rights that confer benefits, but rejects rights whose holders do not benefit from holding them.<sup>34</sup>

Wenar calls his fusion the "several functions" theory of rights because he thinks rights should be conceived of as jointly serving several *different* functions rather than just one. A simple disjunction of will theory and interest theory may at first glance seem too convenient by half, but it seems true that some rights secure the rights-holder's interests while other rights give to the

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<sup>32</sup> Wenar, "Nature of Claim-Rights," 202.

<sup>33</sup> Wenar, "Nature of Rights," 238.

<sup>34</sup> Wenar, "Nature of Rights," 244.

rights-holder morally legitimate sovereignty in some domain over another's duties.<sup>35</sup> That rights at different times do *both* implies some disjunction of will theory and interest theory;

Sreenivasan joins Wenar in this broader reconciliation project, arguing for a hybrid analysis of claim-rights that mashes will and interest theories together.<sup>36</sup> Rights, under Sreenivasan's fusion view, give to the rights-holder the amount of control over others' duties necessary for securing the rights-holder's interests or good.

For reasons that should be obvious to the reader, a will theory of rights (as presented in Hart's "sovereignty" account)<sup>37</sup> alone cannot stand as an account of rights. According to Hart, that you have a right means that you have morally legitimate control over another's freedom and duties with regard to you. But some rights-holders, such as infants or the incapacitated, have no such cognitive control or agency. The will theorist's failure to account for such rights is untenable, and with its reliance on contingent capacities will theory fails to account for inalienable rights. Wenar describes another problem for will theory, that of accounting for certain instances of "unwaivable claims":

Many important rights, such as the complex bodily right...do include a paired power to alter a claim. But many do not. For example, you have no legal power to waive or annul your claim against being enslaved, or your claim against being tortured to death. The will theory therefore does not recognize that you have a legal right against being enslaved, or against being tortured to death. Yet most would regard these unwaivable claims as rights, indeed as among the more important rights that individuals have.<sup>38</sup>

But Wenar is more openly optimistic about the ability of an interest theorist of rights to account for inalienable rights:

Yet where the will theory falters, the interest theory flourishes. The interest theory holds that the single function of rights is to further their holders' interests. More specifically, rights are those incidents whose purpose is to promote the well-being of the rightholder. As McCormick puts it, "The essential feature of rules

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<sup>35</sup> Shortly, I will take the position that these rights that seemingly *merely* secure for the rights-holder a domain of sovereignty over another's duties actually *ultimately* do so in order to secure for the rights-holder some *interest*. I will throw my lot in with the interest theorist.

<sup>36</sup> Sreenivasan, "Hybrid Theory" and "Duties."

<sup>37</sup> Hart, *Essays on Bentham*.

<sup>38</sup> Wenar, "Nature of Rights," 239.

which confer rights is that they have as a specific aim the protection or advancement of individual interests or good.”<sup>39</sup>

Leading interest theorist Joseph Raz presents his variety of interest theory, laying out a definition for “having a right” and the conditions necessary for possessing rights:

*Definition:* 'x has a right' if and only if x can have rights, and other things being equal, an aspect of x's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.<sup>40</sup>

*The Principle of Capacity to have Rights:* An individual is capable of having rights if and only if either his well-being is of ultimate value or he is an 'artificial person' (e.g. a corporation).<sup>41</sup>

Being of ultimate, i.e. non-derivative' value is being intrinsically valuable, i.e. being valuable independently of one's instrumental value. Something is instrumentally valuable to the extent that it derives its value from the value of its consequences, or from the value of the consequences it is likely to have, or from the value of the consequences it can be used to produce. Being of ultimate value is being valuable even apart from one's instrumental value.<sup>42</sup>

Rights are grounds of duties in others.<sup>43</sup>

Immediately, Raz's interest theory dispatches an objection to interest theories of rights, more generally—that, surely, there are certain things that are “good” for a person to which a rights-holder cannot be thought to have a right, and that therefore rights cannot serve to secure goods *simpliciter*. For example, one does not have the right to unlimited funds from the federal government, although such funds would be *expedient* for the rights-holder. The difference between “goods” that are legitimately interests and those that are not is contained in Raz's definition above. The aspect of one's well-being in question has to be sufficient reason for holding some other person to be under a duty; not just any “good” will do. So, Raz's distinction here between *morally legitimate interests* and, simply, *goods* is to serve as the distinction

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<sup>39</sup> Wenar, “Nature of Rights,” 241.

<sup>40</sup> Raz, “Nature of Rights,” 197. A thing's being “sufficient reason for holding some other person(s) to be under a duty” just is, I take it, Raz's condition for a thing's being an interest. One's interests and only one's interests (that is, not mere goods) serve as grounds for holding another to be under a duty.

<sup>41</sup> Raz, “Nature of Rights,” 197.

<sup>42</sup> Raz, “Nature of Rights,” 205.

<sup>43</sup> Raz, “Nature of Rights,” 198.

between those goods-for-us to which we have a right and those things which are merely good for us.<sup>44</sup>

Interest theorists Neil MacCormick and Matthew Kramer contribute their own varieties of interest theories of rights:

To ascribe to all members of a class *C* a right to treatment *T* is to presuppose that *T* is, in all normal circumstances, a good for every member of *C*.<sup>45</sup>

The essential feature of rules which confer rights is that they have as a specific aim the protection or advancement of individual interests or goods.<sup>46</sup>

(1) Necessary but insufficient for the actual holding of a right by *X* is that the right, when actual, protects one or more of *X*'s interests.

(2) The mere fact that *X* is competent and authorized to demand or waive the enforcement of a right will be neither sufficient nor necessary for *X*'s holding of that right...

For the Interest Theory, then, the essence of a right consists in the normative protection of some aspect(s) of the right-holder's wellbeing.<sup>47</sup>

So, Raz is joined by MacCormick and Kramer in holding that rights serve to protect the rights-holder's interests. Interest theories of rights reject the claim of will theorists that what accounts for a rights-holder's rights is his or her choices, or discretion, or ability to exercise a bit of morally legitimate dominion over another's duties. In normal circumstances one's interests are not waivable, so there is no problem from within interest theories with accounting for one's rights

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<sup>44</sup> Raz's work is not featured in my work, but one might wonder: in talking of interests, goods, and rights, what accounts for the difference between mere *goods for us* and *goods to which we have claim*. Raz's notion of an interest being a "sufficient reason" for holding some other to be under some duty distinguishes between those goods to which we have no right and those to which we do have a right. And the difference between the two types of goods is whether or not the good is an interest, an aspect of well-being, for us.

Presumably, then, in Raz's view there are goods-for-us that are not aspects of our well-being and therefore do not serve as sufficient reasons for holding another to be under some duty regarding us; and there are goods-for-us that *are* aspects of our well-being and therefore *do* serve as sufficient reasons for holding another to be under some duty. This distinction between goods-for-us that are interests and goods-for-us that are not interests is a general problem for any utilitarianism that takes rights seriously; because utilitarian views that take rights seriously have to answer the question *Which goods do we and don't we have morally legitimate claim to, and why?* Raz would say: *We have claim to the ones that are aspects of our well-being*. Later, I address this problem in my Wolterstorffian account with appeal to:

- i. objective facts of the matter about which goods are life-goods that safeguard our well-being, and
- ii. the notions of *avoidable* and *unavoidable deficits of realizations*.

<sup>45</sup> MacCormick, "Children's Rights," 311.

<sup>46</sup> MacCormick, "Rights in Legislation," 192.

<sup>47</sup> Kramer, "Getting Rights Right," 28.

that are normally conceived of as inalienable. So, too, can interest theories account for the rights of those beings who lack the capacity to exercise dominion in a “sphere of sovereignty”—like the small child, or the comatose patient. Surely, after all, the small child and the comatose have interests. But Wenar highlights that weakness of interest theories that was mentioned earlier: surely, there are rights one has that are not had in virtue of their serving the function to secure one’s own interests, like the rights we have that are associated with certain roles. Such rights include: the right of a judge to sentence a criminal, the right of a traffic cop to issue tickets, the right of a general to send troops into battle.<sup>48</sup> These rights associated with roles are different in kind from the inalienable human rights that are most relevant to my work. But they are still rights, and the violation of them or their corollary duties is morally condemnable and evaluable in terms of *justice*. Their violation is still a *wrong* because their violation is still a disrespect for human worth. The rights and duties associated with roles, I will argue, are grounded in someone’s interests or in a shared or collective interest, just as any other right is grounded in someone’s interests.

Wenar offers that when faced with the counterexample of role-specific rights, the interest theorist could do one of two things:

1. the interest theorist could reinterpret the judge’s right to pass sentence, for example, to be a right grounded not in its function to secure the judge’s own interests *exclusively* but rather to secure *his own and others’ interests collectively*, or
2. the interest theorist could simply deny that these role-conferred rights are rights in the first place, in virtue of their being irreducible to a single rights-holder’s interests.

Wenar takes (1) and (2) to be unacceptable, with (1) simply demonstrating that the judge’s (for example) interests *singularly* are insufficient to ground her *judge*-rights and with (2) being an

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<sup>48</sup> Wenar, “Nature of Rights,” 242.



unacceptable rejection of the common use of our rights concepts and the strong moral intuitions that come along with that common use.<sup>49</sup> A judge, so these intuitions tell us, inarguably has rights *qua* judge.

Regarding (1): what would it mean for a judge to have a right, exclusively and in her capacity as judge, in virtue of some collective interest?; why is it the case that the *judge* has that right in virtue of the collective interest, so the line of questioning would go, but no other who shares that collective interest does, and what makes the *judge* the sole holder of *judge*-rights if what grounds the judge's rights are interests that are shared in common with others? Interest theory is committed to rights being definitionally linked to *interests* (and functioning to protect those interests), but not to *interests plus some special role or other*.<sup>50</sup> Wenar observed that an interest theorist, in response to the difficulty an interest theorist of rights would have in accounting for rights that are conferred by roles, could simply say of such role-associated rights that they protect interests that are the rights-holder's own *and others' interests*. But Wenar rejected this course of action, because in his view it serves only to emphasize that the interests alone of the rights-holder who occupies a given role are insufficient to account for the rights conferred by that role *to that individual*, presumably an undesirable consequence for any interest theorist who wants a clean account of why a rights-holder who has role-specific rights has those rights in the first place.

But this is too dismissive on Wenar's part—the interest theorist should simply accept what Wenar finds to be unacceptable. The interest theorist should conceive of a judge's rights (for instance) as securing the judge's personal interests *and* the interests of others *in virtue of a property shared in common by the judge and the others*, or *in virtue of some shared interest* (in

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<sup>49</sup> Wenar, "Nature of Rights," 242.

<sup>50</sup> It seems true that a judge has the judge-rights he has in virtue of his role *judge* and it seems true that a judge has those rights independent of any interests he has that are exclusively his. But interest theory, as presented by Wenar, is committed to the judge's judge-rights as being a product of the judge's own interests. Thus, the *prima facie* inability of interest theories of rights to explain at least some rights. I will simply reject that interest theories can only account for an individual's rights by appeal to that individual's exclusive interests.

the impartial interpretation of sovereign laws, for instance) *that obtains*. In that way, the interest theorist could conceive of a role-specific right as acting to secure *collective interests*, interests shared in common, or universally held interests. And if a necessary condition of an interest theory is that an individual's rights serve to secure *interests*, then it should be clear how role-associated rights could be incorporated into interest theories of rights. I have simply added collective interests, or interests shared in common, into the domain of that which an individual's rights could legitimately secure. In the case of the judge, the shared property or shared interest would be a shared membership in society, or a shared interest in the common good, from which the judge benefits individually and from which many others also benefit individually. In rejecting this course of action on the grounds that it just highlights that an individual's (the judge's) singular interests are insufficient to ground all the rights that individual may have (including the rights conferred by unique roles like "judge"), Wenar is simply ignoring that surely there *are* shared group interests (or universally held interests, or a shared interest in a common good), and shared properties that account for those interests. And we should want our theory of rights, if it is to be an interest theory of rights, to be sensitive to *all* the interests that there are, whether they be singular interests or collective interests. Raz endorses a similar view regarding the objection from role-associated rights—that many rights-holders (like the judge) do not, in fact, hold individual interests that are sufficient for having reasons to hold another to be under a duty (to either the judge, to another, or to a society at large).<sup>51</sup> According to Raz, it is the interest of the *general public* which grounds such role-associated rights. I find clarifying that "the interest of the general public" are just interests that are shared in common by *individuals* to be helpful—after all, what exactly is the general public and how could *that* have interests? But if we think of the "general public" in terms of a collective of individuals, each of which has the relevant interests sufficient for accounting for the judge's judge-rights, it becomes clearer how the judge's role-associated rights could be accounted for by appeal to *interests*. *Somebody* (a

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<sup>51</sup> Raz, *Morality of Freedom*, 179, 247-248.

judge), or some entity, has to be responsible for securing the interests shared in common by very many, if in fact there are such interests.

My Wolterstorffian view of rights is not a merely functionalist take. But in it, there is little, if any, conceptual space between the notion of an *interest* and the notion of a *life-good*, so I am happy for my framework to fall into the interest theoretical school of thought when it comes to giving a functionalist account of *what rights do*. And I take the rights that are prioritized by the will theorist—those rights that function in the exercise of one's sovereignty over another's duties—to be simply a subset of all the rights there are that secure interests. When one legitimately exercises one's power to waive or enforce another's duty, one does so in furtherance of one's own interests (or in furtherance of some collective good) or to secure some life-good. This is akin to Sreenivasan's account that fuses will and interest theories by saying that one's powers over another's duties are only those powers necessary for the security of one's interests.<sup>52</sup>

Skorupski, Darwall, and Feinberg present an alternative to that traditional *interest vs. will* schism in the rights literature.<sup>53</sup> Their views fall loosely together into a family called *demand theories of rights*. On Skorupski's view, rights delineate what a rights-holder may demand of another, in the sense of delineating what a rights-holder may compel or exact from another.<sup>54</sup> Demand theories are like will theories in that they feature the agency of rights-holders and members of the moral community, but in demand theories rights are not *derived from* the capacity to exercise any such morally legitimate sovereignty over another's duties. Here is Darwall's variety of demand theory:

Suppose, for example, that you claim something as your right, say, that someone not step on your foot or, after his having done so, that he removes his foot, answer for having stepped on yours, apologize, and so on. In so doing, you presuppose an authority to demand certain conduct of him and to hold him

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<sup>52</sup> Sreenivasan, "Hybrid Theory" and "Duties."

<sup>53</sup> See Skorupski, *Domain of Reasons*; Darwall, "Precis"; and Feinberg, "Nature and Value" and *Social Philosophy*.

<sup>54</sup> Skorupski, *Domain of Reasons*.

accountable for complying with your demand...In having a right to others' not stepping unbidden on your feet, you have the authority to demand that they not do so and to hold them answerable if they do...You having this right creates a distinctive kind of reason for others to avoid your feet. Second-person reasons, as I call them, depend conceptually on the authority to make (and so address) claims and demands...<sup>55</sup>

... any moral agent has [authority to address moral demand] as, as we might put it, an equal member of the moral community. It is sufficient to be a moral agent in this sense that a being have the psychic capacities necessary to enter into relations of mutual accountability, that is, to take a second-person perspective on himself and others and regulate his conduct from this point of view. (Call this second-personal competence.) On this view we are morally accountable to one another; second-personal competence thus grounds a shared second-personal authority to hold ourselves and each other accountable and address moral demands.<sup>56</sup>

The sense in which moral obligations are inescapable is that the reasons they provide are inescapable, that is, that these reasons hold and apply to us irrespectively of our interests, aims, or other idiosyncratic features. What follows from a second-personal analysis is that moral obligations and the second-personal reasons for acting that flow from them are rooted in our second-personal competence. And these are features we cannot give up without removing our very moral agency itself. It is hard to see how moral obligations could be any more inescapable than that.<sup>57</sup>

And Darwall adds that to have a claim-right:

... includes a second-personal authority to resist, complain, remonstrate, and perhaps use coercive measures of other kinds, including, perhaps, to gain compensation if the right is violated.<sup>58</sup>

So Darwall offers a view of rights according to which rights are objective "second-personal reasons" to act in some ways but not others regarding the rights-holder, and these reasons to

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<sup>55</sup> Darwall, "Precis," 216. Here Darwall talks of the "authority to make (and so address) claims and demands." This sounds a lot like the will theorist's language, but in Darwall's view what gives the rights-holder rights to demand certain conduct is not the rights-holder's *capacity of sovereignty* or *capacity of will* or the *exercise of said capacities*, but rather the *authority* to make such demands; and the right serves as an "inescapable" second-personal reason to act (or not) regarding the rights-holder. So, that these inescapable reasons obtain survives certain counterexamples levered at the will theorist—regardless of a rights-holder's lacking some morally relevant capacity (as with the counterexamples that make will theories incapable of attributing rights to infants or the comatose), these inescapable second-personal reasons (rights) obtain. In this demand theory, the *authority* to make a demand takes theoretical priority over the capacity to make a demand or the actual demand itself. One's having the authority to make a demand (one's having the right) generates "a distinctive kind of" second-personal reason to act or not act in particular ways regarding one. And these second-personal reasons are recognizable by any member of the moral community. More shortly.

<sup>56</sup> Darwall, "Precis," 220–221.

<sup>57</sup> Darwall, "Precis," 228.

<sup>58</sup> Darwall, *Standpoint*, 18.

act presuppose the authority of the rights-holder to make the demand. Those with second-personal competence regulate their conduct according to these reasons. Darwall insists it should be clear that the moral obligations characterized as rights are inescapable, because the second-personal reasons are inescapable by those (agents) who are capable of taking on the relevant second-personal perspective. The authoritative reasons for acting are not proscribed from the outside; they are *recognized* as objective by second-person competent agents.

In much the same way, Joel Feinberg (1970, 1973) presents his own view:

To have a right is to have a claim against someone whose recognition as valid is called for by some set of governing rules or moral principles. To have a claim in turn, is to have a case meriting consideration, that is, to have reasons or grounds that put one in a position to engage in performative and propositional claiming. The activity of claiming, finally, as much as any other thing, makes for self-respect and respect for others, gives a sense to the notion of personal dignity.<sup>59</sup>

A right is something a man can stand on, something that can be demanded or insisted upon without embarrassment or shame.<sup>60</sup>

Feinberg's noteworthy "Nowheresville" thought experiment entertains what a society would be missing were it devoid of rights; he asks us to imagine a society with moral values, duties, and laws, but no rights.<sup>61</sup> He insists that the crucial agent-dimension of our social relations to others would be missing—that dimension of our moral relations to others in which our own human dignity is salient, and according to which we can place demands on others to certain goods or treatment. Simply, *claims* and *the act of claiming* would be missing. In Feinberg, we find rights to be authoritative moral entities in virtue of their being validated by governing rules or moral principles; in his theory of rights we see no appeal to capacities or sovereignty over another's relevant duties, but rather the presence of "cases meriting consideration" (reasons and grounds for claiming), the merit of which is determined by governing rules or principles that recognize the claim to be valid. Feinberg's view differs from Darwall's view, in part because Darwall's does not

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<sup>59</sup> Feinberg, "Nature and Value," 257.

<sup>60</sup> Feinberg, *Social Philosophy*, 58–59.

<sup>61</sup> Feinberg, "Nature and Value," 243–249.

make fundamental appeals to governing rules and principles; Darwall's second-personal reasons for action do not govern and validate claims, so much as they are recognized by every member of the moral community. In Feinberg, the case meriting consideration justifies the claim, and the claim is verified by some governing rule; in Darwall, second-personal reasons to act are generated by the authority of a rights-holder to make claims and demands.

Demand theories necessitate the recognition of reasons to act or principles for acting, but they skirt the appeals of the will theorist to the exercise of autonomy and thus avoid that crippling weakness of will theories—that, surely, there are rights-holders who cannot practice their moral sovereignty. Under demand theories these “counterexample” rights-holders (the infant, the incapacitated) would still have “cases meriting consideration” and “authority to make demands”—and there would still be inescapable reasons to treat them (the infant, the incapacitated) in thus-and-such a way, regardless of the incapacitated rights-holder's inability to exercise certain capacities required by the will theorist, or their inability to practice Darwall's second-personal competence. In Darwall's case, especially, the distinction is important—he relies not on the *capacity* to exercise claims, but rather on the *authority* to exercise claims. Similarly, the authority of Feinberg's claims relies not on some active exercise or capacity of sovereignty, but rather on the existence of a case that merits consideration and a subsequent verification of that case meriting consideration by governing rules or principles.

Demand theories can survive the counterexamples levered at the will theories—that beings that lack certain capacities, like infants or the comatose, lack certain human rights—because demand theories can account for the moral patient-regarding nature of second-personal reasons to act (or not). Darwall's view is that possessing the capacities necessary to enter into relations of mutual accountability and practicing second-personal competence is sufficient for being a moral agent; but those same capacities are not necessarily *necessary* for being a moral agent or patient. Whether or not a baby or the comatose enjoys second-personal competence, the adult whom most would say has duties to the baby or the comatose enjoys

second-personal competence. And the rights of the infant or the comatose can be accounted for in the second-personal competent adult's recognition of inescapable reasons to treat infants and the comatose in some ways but not others, reasons derived from the authority of the infant or the comatose to make the relevant demand. Surely, one would not need another rights-holder's cooperation or active mutuality in order to take oneself to be duty-bound to that rights-holder. The infant and the comatose would be, strictly speaking, incapable of exercising any sort of demand, but someone who is second-personally competent could recognize inescapable reasons for acting in some ways but not others toward an infant or the comatose, and thus recognize their *obligations* to the infant or the comatose, regardless.

One could posit that these duties *do* have correlative rights, and thus demand theories could account for the rights of infants and the comatose.<sup>62</sup> Darwall holds that "second-personal competence thus grounds a shared second-personal authority to hold ourselves and each other accountable and address moral demands," and that might be some reason to think that second-personal competence *is required for having the authority to make a demand*—but the claim that "second personal competence grounds shared second-personal authority to hold ourselves and each other accountable and address moral demands" is not identical to the claim that "second-personal competence grounds an infant's or comatose authority to make morally legitimate demands." I think it's important, here, to distinguish between a community effort to address rights characterized by mutual accountability to second-personal reasons (which Darwall takes is grounded by second-personal competence) and an infant's authority, *simpliciter*, to make a demand or claim. The infant's authority to make a demand, for instance, could obtain prior to or independent from any shared authority within the moral community to hold the members of the moral community mutually accountable, or any intentional process of addressing moral demands. One has to be second-personally competent in order for one to recognize inescapable reasons for one to act regarding others; but a person (or animal, or infant) would

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<sup>62</sup> Cf. Lyons, "Correlativity."

*not* necessarily have to be second-personally competent in order for *another* to recognize inescapable reasons for acting (or not) in certain ways regarding them. In this way, a baby or a comatose patient could have a “case meriting consideration,” and could have “authority” to place a demand”—all the while lacking the capacity to place the demand or the capacity for second-personal competence.

Ultimately, I accept that my Wolterstorffian theory of rights is most at home in the interest theory of rights—rights as serving to secure some interest. But here it is also worth noting my theory’s consonance with Darwall’s and Feinberg’s demand theories. Interest theories answer the question of *what rights do* by pointing to the interests or goods that rights secure, but these demand theories are not strictly functionalist accounts of rights. Both Darwall and Feinberg are more interested in offering accounts of *what it means to have a right*, and they offer that to have a right is to have a case worth considering, or for there to be objective second-personal reasons for treating rights-holders in some ways but not others. There is no *prima facie* inconsistency between interest theories of rights and demand theories of rights—these different analyses simply ask and answer different questions. Indeed, we could conceive of many of the cases that merit consideration as being claims to certain interests.

In my Wolterstorffian account, our human rights are socio-moral entities that supervene on human worth; our human worth is a fact about us that gives normative force to claim-rights to certain life-goods in particular socio-moral contexts. Human worth is either respected or disrespected, by which I will just mean that morally legitimate claims are either answered or ignored or violated. This talk of objective worth is consonant with Darwall’s talk of objective second-personal reasons for respecting a rights-holder; it is also consonant with Feinberg’s talk of rights-holders having cases meriting consideration. It is consistent with my view to say that in different social contexts our human worth is an objective *reason* to answer the claims made by a rights-holder (I am thinking of normativity, here); it is consistent with my view to say that in our highly contextualized social relations *our human worth just is a case meriting consideration*. I do



not necessarily offer my account of human worth and human rights as against Darwall's or Feinberg's model; rather, I seek to emphasize the intrinsically social nature of rights, the location of their normative force in their supervenience base (human worth), and their operation in real time as normatively binding claims against others and the systems, institutions, and society in which we find ourselves. I am in agreement with Darwall that there are inescapable reasons for acting toward rights-holders in some ways but not others. And I am in agreement with Feinberg that rights-holders have cases meriting consideration. All of that talk is consistent with conceiving of our rights as being our morally legitimate claims to certain life-goods, claims that are the function of our being the sorts of things we are and our depending on certain life-goods for our well-being. But of course, my view would place human worth at the center either of those frames; the claims are given moral significance by that moral property, worth.

Before moving on, I will quickly mention John Hospers' account of rights, an exemplar of a libertarian account of rights:

When I claim a right, I carve out a niche, as it were, in my life, saying in effect, "This activity I must be able to perform without interference from others. For you and everyone else, this is off limits." And so I put up a "no trespassing" sign, which marks off the area of my right. Each individual's right is his "no trespassing" sign in relation to me and others. I may not encroach upon his domain any more than he upon mine, without my consent. Every right entails a duty, true—but the duty is only that of forbearance—that is, of refraining from violating the other person's right. If you have a right to life, I have no right to take that life; if you have a right to the products of your labor (property), I have no right to take it from you without your consent. The non-violation of these rights will not guarantee your protection against natural catastrophes such as floods or earthquakes, but it will protect you against the aggressive activities of other men. And rights, after all, have to do with one's relations to other human beings, not with one's relations to physical nature.<sup>63</sup>

Hospers is representative of the view that the primary human rights are rights to life, liberty, and property. From human nature, we can derive that certain activities of rights-holders ought to be morally and legally protected. For libertarianism, rights are constraints on another's actions with

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<sup>63</sup> Hospers, *Libertarianism*, 370-371.

regard to the rights-holders, not claims against another or against a State to certain goods or services (termed welfare rights).

### C. Rights in Mill

John Stuart Mill's utilitarianism is a paradigm example of an interest theory of rights.<sup>64</sup> Though paradigmatic of interest theories of rights, there is a *prima facie* incompatibility between a utilitarian ethic that takes as its maxim "maximize utility" and talk of rights. Any utilitarian ethic, for instance, faces the objection: strictly means-to-end moral analyses have the troubling implication that were some morally abhorrent act (like that of torturing an innocent child) actually somehow to maximize the collective good, then that act would, in the case where it actually serves to maximize the good, be the right thing to do. In an unexamined utilitarian framework, there either is no place for rights, or things are such that the rights that a child (for instance) has not to be tortured do not trump considerations of collective utility.

In an 1872 letter to John Venn, Mill explicates his utilitarianism:

I should not fear to defend Kant's maxim against your criticisms: He could not mean, nor could Paley mean, that we should so act that the whole human race could with general benefit do exactly what we are doing; they meant that our conduct ought to be capable of being brought under a rule to which it would be for the general benefit that all should conform. This rule, in your example of taking orders, would not be that all mankind might with public advantage take orders, but that the choice of a profession should depend (under limitations which could be stated) on the aptitudes and convenience of the individual.

One more remark. I agree with you that the right way of testing actions by their consequences, is to test them by the natural consequences of the particular action, and not by those which would follow if every one did the same. But, for the most part, the consideration of what would happen if every one did the same, is the only means we have of discovering the tendency of the act in the particular case.<sup>65</sup>

Here Mill is an act utilitarian in theory, but in practicality acknowledges that the only way to consider the consequences of a particular action is by asking what the consequences would be, generally, if everyone did the same under some general rule. Presumably he thinks this

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<sup>64</sup> Mill, *Utilitarianism*.

<sup>65</sup> Mill, "Letter."

because the only way to judge or predict what the consequences of *my action* will be, and thus to judge or predict its morality, is with reference to the general tendency.

Mill conceives of rights as our claims against society to its protection of our access to certain goods. Mill writes:

Justice implies something which it is not only right to do, and wrong not to do, but which some individual person can claim from us as his moral right...When we call anything a person's right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law, or by that of education and opinion...To have a right, then, is, I conceive, to have something which society ought to defend me in the possession of.<sup>66</sup>

And Mill is cognizant of that *prima facie* tension between talk of rights and an unanalyzed utilitarianism that gives its consideration only to the maximization of the collective good. Mill accepts the moral intuitions we have regarding justice—that there are ways we ought to treat others and ought not to treat others—and he accepts the intuitions about *wrongness* that accompany violations of those rules about how to treat others. Mill calls our moral judgements regarding rights “cases of justice,” and he calls our moral judgments regarding utility “cases of expediency.” In handling apparent tensions between the two kinds of cases, Mill writes:

It has always been evident that all cases of justice are also cases of expediency: the difference is in the peculiar sentiment which attaches to the former, as contradistinguished from the latter. If this characteristic sentiment has been sufficiently accounted for; if there is no necessity to assume for it any peculiarity of origin; if it is simply the natural feeling of resentment, moralised by being made coextensive with the demands of social good; and if this feeling not only does but ought to exist in all the classes of cases to which the idea of justice corresponds; that idea no longer presents itself as a stumbling-block to the utilitarian ethics.<sup>67</sup>

In this passage, Mill attempts to dissolve the conflict between a utilitarian model that exclusively weighs social utility in its moral calculus and the sense of *justice*, a sense of rights and wrongs, that is universal in its various manifestations in human moral cognition. And he is exploring the conflict in light of the fact that we have moral intuitions of both varieties regarding the very same state of affairs.

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<sup>66</sup> Mill, *Utilitarianism*, 54.

<sup>67</sup> Mill, *Utilitarianism*, 259.

Mill is aware of objections to his utilitarianism that take rights (conceived of as moral trumps) and his utilitarianism to be incompatible, so he seeks to establish notions of justice and utility such that the *just* act and the *expedient* act in any one case should be conceived of as *the very same act*. As long as the sentiment of justice is “sufficiently accounted for,” as long as the origin of the intuition of justice is sufficiently “non-peculiar,” as long as these intuitions of justice are considered in light of the social good, and as long as the intuition of justice arises in all such cases, Mill accepts that *justice* and *expediency* are co-extensive terms, at least in cases where consideration of both justice and expediency are required. That is, acting according to the maxim “maximize utility” will not sometimes violate or countermand our accurate intuitions about justice and rights. And actions that are in accord with the sentiments of justice will also be actions that maximize utility; to repeat Mill, “it has always been evident that all cases of justice are also cases of expediency.” This is the Millian answer to the rights theorist’s objections that an individual’s rights ought not to be forsaken in considerations of the collective good, and they ought not to be considered mere means to collective happiness. If Mill is right about the coextension of actions that are motivated by considerations of justice with actions that are dictated by the maxim “maximize utility,” then the objections of the rights theorist against the utilitarian can be met.

The way Mill handles our intuitions about justice, our intuitions about utility, and those cases in which our utility calculations and rights might be in conflict is helpful:

...particular cases may occur in which some other social duty is so important, as to overrule any one of the general maxims of justice. Thus, to save a life, it may not only be allowable, but a duty, to steal, or take by force, the necessary food or medicine, or to kidnap, and compel to officiate, the only qualified medical practitioner. In such cases, as we do not call anything justice which is not a virtue, we usually say, not that justice must give way to some other moral principle, but that what is just in ordinary cases is, by reason of that other principle, not just in the particular case.<sup>68</sup>

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<sup>68</sup> Mill, *Utilitarianism*, 95.

Rather than conceiving of rights as *trumps* full stop, as holding regardless of utilitarian considerations or when in conflict with some other principle of right action, Mill conceives of rights (“what is just”) as being *contextualized*.<sup>69</sup>

In normal cases, for example, one has the duty not to steal food; in cases of emergency (as when someone’s life is at stake and could be saved with a loaf of bread), one is perhaps permitted or even has a duty to coerce bread from someone with an abundance. The conditions and demands of justice in one situation are not necessarily the conditions and demands of justice in another situation; social considerations themselves play into our judgements about justice, and for Mill justice is socially contextualized. So, typically a baker has a claim against his fellow townspeople, such that they ought not to steal his bread, and presumably Mill would argue that such claims when respected contribute to the maximization of utility. But in some emergency, as when a desperate father’s son would be saved with a loaf of bread, a baker would have no such morally legitimate claim against the father such that the demands of justice decree that the child go breadless (assuming the baker has enough bread and is not willing to be charitable). It is not that utilitarian considerations of the starving boy *trumped* the baker’s right; rather it is that, in this particular context, the baker *has no such right against the desperate father and boy*, and instead the starving boy should be conceived of as making a morally legitimate claim against the baker. So, there was no baker’s right for the utilitarian’s considerations of the starving boy’s interests to *trump*. When the father steals the loaf, he is, then, doing both that which is required by justice (his duty to the boy, who has a right not to die of starvation in most contexts) and that which is required by the maxim “maximize utility” (alleviating the boy’s horrible suffering).

This talk of rights as being contextualized—our claim-rights against others as either obtaining or not obtaining in the context under examination—is insightful. It seems right that we

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<sup>69</sup> For one exemplar of the view that rights are the trumps possessed by an individual, see Dworkin, *Taking Rights Seriously*.

should index particular rights to particular contexts, and it remains for the utilitarian to answer whether or not some rights will obtain in all contexts—that is, are there truly inalienable rights, rights for which there is no context in which they do *not* obtain? In the real world, our moral contexts shift, and our account of rights needs to be able to handle moral dilemmas and the shifting moral contexts and extreme cases that come with them. Alternatively, we could conceive of rights as being a complex web of overlapping and competing moral entities, and we could lay out the conditions in which one right trumps another right for all of those moral entities. But it is simpler to conceive of rights as being highly contextualized—the world populated by a plethora of moral contexts in which it is clear that one right obtains and another does not, rather than by a fixed plethora of competing and countermanding rights.

The broader project of defining in which contexts rights do and do not obtain is otherwise known as *specificationism*.<sup>70</sup> Steiner endorses a form of specificationism according to which all morally legitimate rights are delineable as compossible,<sup>71</sup> but rights-theorists like Feinberg reject the project on grounds that we simply are not in the required epistemic position for providing a full accounting of rights as such.<sup>72</sup> But as for the general claim that we should conceive of rights as being contextualized, and never over-lapping, I think this epistemic worry need not bother us. I will borrow this notion of a contextualized right for my own Wolterstorffian account, and we can proceed with the epistemological humility required for knowing that it will be a difficult task to provide a list of one's rights in any given number of moral contexts. But that there is the broader epistemological worry that it is difficult to provide an exhaustive list of the rights one has in any given situation should not be a mark against this claim: *There are different moral contexts, and the rights you have are to be understood as being indexed to the particular moral context you find yourself in; and perhaps, there are rights that obtain in every moral context.*

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<sup>70</sup> Shafer-Landau, "Specifying Absolute Rights."

<sup>71</sup> Steiner, *Essay on Rights*.

<sup>72</sup> Feinberg, *Bounds of Liberty*.

So, the Millian is committed to saying that the perceived conflict between commitment to social utility and commitment to justice and rights can be dissolved with correct understanding. In the debate about rights, it is typically understood to be a weakness of utilitarianism that in some situations a subject's rights could, in principle, be violated due to utilitarian considerations. But according to Mill, there would be no such violation. When one perceives that one's right is being trumped by some utilitarian calculation, one is misperceiving; one merely harbors a misconception of justice *in the moral context they find themselves in*. Thus, Mill offers a framework for understanding the role rights might play in a utilitarian, interest-theoretical ethic.

#### D. Beitz and Human Rights

In his book *The Idea of Human Rights*, Charles Beitz characterizes the human rights terrain (in particular, the terrain canvassed by international human rights theorists) as carved into two camps that both come up short: naturalistic theories of human rights and agreement theories of human rights. The core difference between the two, according to Beitz, is where the moral authority of human rights comes from:

Naturalistic theories appeal to what is taken to be an order of moral values whose claim on us does not depend on their acceptance in any particular culture or society, or *a fortiori* in international society. The human rights of international doctrine are interpreted as an attempt to embody in international legal and political practice the values of this independent normative order, which is the source of their (moral) authority. By contrast, according to agreement conceptions, the fact that human rights are in some way common to the moral codes of the world's societies is itself the source of their authority. It is possible, of course, that the normative requirements of the best-justified naturalistic theory and the best-justified agreement theory might coincide. But any such coincidence would be a contingent matter requiring an explanation.<sup>73</sup>

In Beitz's carving up of the terrain, my account will fit squarely into the naturalistic camp. Beitz terms some accounts as "naturalistic" following John Simmons's usage of that term terminology, and Simmons writes:

*Natural* rights...are those rights that can be possessed by persons in a "state of nature" (i.e., independent of any legal or political institution, recognition, or enforcement)...

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<sup>73</sup> Beitz, *Human Rights*, 74.

Human rights are those natural rights that are innate and that cannot be lost (i.e., that cannot be given away, forfeited, or taken away). Human rights, then, will have the properties of universality, independence (from social or legal recognition), naturalness, inalienability, non-forfeitability, and imprescriptibility. Only so understood will an account of human rights capture the central idea of rights that can always be claimed by any human being.<sup>74</sup> (185)

Beitz characterizes naturalistic theories of rights as splitting further into sub-camps.

James Griffin is an exemplar of the “personhood” camp, according to which human rights are protections of interests and goods, one of which includes human personhood. Personhood, to Griffin, *just is* our normative agency, the various interests of which include autonomy, minimum provision, and liberty.<sup>75</sup> Personhood is an entity that is morally privileged and protected.

Amartya Sen and Martha Nussbaum are exemplars of the “human capabilities” variety of naturalistic theories.<sup>76</sup> In these views, human well-being and advantage turn on the attainment of certain actions and states of being (*doings* and *beings*):

Instead of asking “How satisfied is a person A,” or “How much in the way of resources does A command,” we ask the question: “What is A actually able to do and to be?” In other words, about a variety of functions that would seem to be of central importance to a human life, we ask: Is the person capable of this, or not? This focus on capabilities, unlike the focus on GNP, or aggregate utility, looks at people one by one, insisting on locating empowerment in *this* life and in *that* life, rather than in the nation as a whole. Unlike the utilitarian focus on satisfactions, it looks not at what people feel about what they do, but about what they are actually able to do...Finally, unlike the focus on resources, it is concerned with what is actually going on in the life in question: not how many resources are sitting around, but how they are actually going to work in enabling people to function in fully human ways.<sup>77</sup>

These “functionings” are the primitives of theories of capability. A person’s “capability set” consists of the alternative combinations of functionings the person is in a position to achieve. Capability is to be distinguished, on the one hand, from value achieved (that is, actual functionings) and, on the other, from merely formal opportunity (the absence of restriction by force or law). Capability is a kind of freedom, not achievement....If we think of functionings as “valuable doings and beings,” then it is clear that the idea of capability is not normatively neutral. Some “doings and beings” will not count as functionings if they are not valuable,

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<sup>74</sup> Simmons, “World Citizenship,” 185 (emphasis in original).

<sup>75</sup> Griffin, *On Human Rights*, 31–33.

<sup>76</sup> Sen, “Elements,” and Nussbaum, “Human Rights Theory.”

<sup>77</sup> Nussbaum, “Human Rights Theory,” 285.



and the capability to achieve these doings and beings will not count as a part of a person's well-being or advantage.<sup>78</sup>

So, based on the sort of thing we are, our capabilities make different doings and beings valuable, and it is those valuable doings and beings that ought to be protected. Nussbaum (1997) defines a human right:

...an especially urgent and morally justified claim that a person has, simply by virtue of being a human adult, and independently of membership in a particular nation, or class, or sex, or ethnic or religious or sexual group.<sup>79</sup>

So, in Nussbaum, human rights protect the capabilities of humans to exercise certain morally significant capabilities and "functionings."

In his discussion of agreement theories of human rights, Beitz splits that camp further into three subcamps that each has its own organizing principle: the idea of a *common core*, the idea of *overlapping consensus*, and the idea of *progressive convergence*. R. J. Vincent describes the common core view as understanding our human rights to be a "core of basic rights that is common to all cultures despite their apparently divergent theories."<sup>80</sup> According to Beitz:

The metaphor of a "common core" is usually presented as an account of the nature of human rights, but it has obvious implications for the normative questions of their content and scope. For example, rights requiring democratic political forms, religious toleration, legal equality for women, and free choice of a marriage partner would be excluded because, as an empirical matter, these protections are not found in all of the world's main moral systems. Other rights might be excluded if they were understood to generate certain kinds of duties; if, for example, the right to a high standard of physical and mental health were thought imply that every society has an obligation to ensure the accessibility of health care for all, then the existence of disagreement about the extent of distributive responsibilities outside of families or local communities might exclude this as well.<sup>81</sup>

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<sup>78</sup> Beitz, *Human Rights*, 62.

<sup>79</sup> Nussbaum, "Human Rights Theory," 292.

<sup>80</sup> Vincent, *Human Rights*, 48–49.

<sup>81</sup> Beitz, *Human Rights*, 75.

Rex Martin and Charles Taylor produce the ideas central to the “overlapping consensus” view.<sup>82</sup> Beitz characterizes the view, merely borrowing John Rawls’s language for its title:

... one might shift to a more elaborate conception which sees human rights as falling within an “overlapping consensus” of political moralities. Such a view would have two essential elements. The first is a distinction between human rights, conceived as a set of common global norms adopted for certain political purposes, and the diverse array of moral, philosophical, and religious doctrines or outlooks found among the world’s cultures. The second is the hypothesis that, given an understanding of the purposes of the global norms, it would be reasonable for adherents of any culture to accept these norms on the basis of their own moral, philosophical, and religious doctrines. On such a view, we need not conceive of “universal” human rights as part of a common core in the sense of being actually recognized by or contained in all conventional moralities; we think of them, instead, as norms for global political life reachable from a variety of possibly incompatible foundational positions.<sup>83</sup>

Beitz characterizes agreement theories as potentially dead on arrival, given that they are to provide members of every culture with reasons to act, and given that the notion of a human right is hardly accepted and shared among the world’s main cultures (much less, agreed upon). So, given those obvious difficulties, he proposes a third variety of agreement theory:

One response to this dilemma is to envision an intercultural agreement as arising, not from the actual contents of existing moral cultures, but instead from the contents of these cultures as they might develop or evolve under pressure for adaptive reinterpretation...Human rights would still be conceived as falling within an “overlapping consensus” but the boundaries of the consensus would not be set by the philosophical and moral beliefs that actually prevail in the world’s major cultures...but rather by the best available elaboration of the basic normative materials of these cultures for the circumstances of modern life...I shall refer to it as “progressive convergence.”<sup>84</sup>

For this formulation of an agreement theory of human rights Beitz draws on Taylor (1999), Abdullahi A. An-Na’im, and Joshua Cohen.<sup>85</sup> I will not say much here about “progressive convergence,” aside from observing that, firstly, it seems to be a clearly *post hoc* attempt to salvage agreement theories and, secondly, the entire notion of moral progress seems to undermine the legitimacy of the agreement theoretical project. If, after all, our rights and

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<sup>82</sup> Martin, *System*, and Taylor, “Conditions.”

<sup>83</sup> Beitz, *Human Rights*, 76.

<sup>84</sup> Beitz, *Human Rights*, 88.

<sup>85</sup> See Taylor, “Conditions”; An-Na’im, *Islamic Reformation*; and Cohen, “Minimalism.”

moral significance are just the sum of our agreements on those things, what is there to progress toward and according to what standard are we urging our neighboring states to make progress? This view seems to entail some objective standard that obtains, whether or not there is agreement to be found on the standard.

Beitz recounts Rawls's departure in *The Law of Peoples* from the debate between naturalists and agreement theorists.<sup>86</sup> In *The Law of Peoples*, Rawls characterizes the international scene as a collection of liberal democracies and "decent" states that are not democratic. Each state is individually committed to reasonable conceptions of justice and of a common good. The members of this "Society of Peoples" offer to one another public reasons and shared principles and norms regarding one another's actions, just one category of which is human rights. Rawls's human rights include the right to life and means of subsistence, personal liberty, personal property, and equal treatment under the law—and though some "outlaw states" may refuse to abide by the norms and principles shared by the Society of Peoples, Rawls holds human rights to be universally applicable to and binding on every contemporary society. And finally, in his pragmatic view, human rights have immense political significance: adherence to the corpus of rights available to the Society of Peoples constitutes a society's good standing as reasonably just.

Beitz does not accept any of the above views as his own on grounds that they each fail in different respects. The naturalist views, he says, fail the original project of international human rights theorizing:

It was intended from the outset to afford common grounds for political action to persons situated in cultures with differing moral traditions and political values. It was explicitly agreed by the framers, as a general matter, that international doctrine should not embrace its own justification, and in particular that it should not presuppose that human rights are "natural." It is a mistake to identify the objects of interest with objects that originate in one or another theoretical project whose conception and motivation differ from those of the contemporary practice.<sup>87</sup>

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<sup>86</sup> Rawls, *Law of Peoples*.

<sup>87</sup> Beitz, *Human Rights*, 72.

So naturalistic theories fail to be appropriately worldview-neutral. Agreement theories fail, according to Beitz, in large part due to the instability of the agreements made by societies with internally inconsistent values and commitments. And they fail for another reason (and though Rawls's is not strictly speaking an agreement theory, it is subject to the same accusation): whether discussing the common core view, the overlapping consensus view, or Rawls's reasonable justice view, the rights and norms agreed to are simply too narrow to account for the full suite of human rights ensconced by the real-world international human rights theorizing that has taken place over the last half-century. Beitz advocates for a "practical conception" of rights:

...we might frame our understanding of the idea of a human right by identifying the roles this idea plays within a discursive practice. We attend to the practical inferences that would be drawn by competent participants in the practice from what they regard as valid claims of human rights. An inventory of these inferences generates a view of the discursive functions of human rights and this informs an account of the meaning of the concept.

I shall call a conception of human rights arrived at by this route a "practical" conception. Such a conception differs from both naturalistic and agreement views in the following way. A practical conception takes the doctrine and practice of human rights as we find them in international political life as the source materials for constructing a conception of human rights. It understands questions about the nature and content of human rights to refer to objects of the sort called "human rights" in international practice. There is no assumption of a prior or independent layer of fundamental rights whose nature and content can be discovered independently of a consideration of the place of human rights in the international realm and its normative discourse and then used to interpret and criticize international doctrine...Instead, we take the functional role of human rights in international discourse and practice as basic: it constrains our conception of a human right from the start.<sup>88</sup>

With that, Beitz offers a functionalist approach to human rights, turning the debate about the nature of human rights on its head and insisting that human rights *just are* the role they play in international human rights deliberation and policy.

The sort of *praxis-first* theorizing is interesting but problematic, to say the least. Take the obvious objection: if what human rights are is simply what the international human rights discourse is up to, then we can imagine a time in human history when there were no human rights: namely, any time prior to the 20<sup>th</sup> century. After all, Beitz himself points out that broad

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<sup>88</sup> Beitz, *Human Rights*, 102–103.

international commitments to the existence of human rights is a modern phenomenon. If what Beitz means is that whatever corpus of human rights that exists is merely that corpus of rights listed in contemporary international human rights theorizing, and that no other human rights exist, then I reject Beitz's project wholesale. I opt, instead, for the view that there are human rights, that we can reason about them (albeit imperfectly), and that the task of the contemporary international human rights theorist should be to provide an accounting of the human rights that exist pre-theoretically, prior to societal agreement, and so on.

Beitz's praxis-first functionalism is inconsistent with my Wolterstorffian account of human rights as normatively binding claims that supervene on human worth in highly individuated socio-moral contexts. I would prefer it if the project of international human rights deliberation and agreement were informed by careful theorizing about human worth, the respect that is due to each human, and the life-goods to which humans have legitimate claim in various socio-moral contexts. But I do not set out to undermine Beitz's project—we are merely engaged in two separate projects. Beitz's is a political project; mine, at its core, is philosophical and defies the international human rights project's goal of each party coming to the table *without* a firm commitment to any political, religious, or philosophical account of *why there are human rights in the first place*. I have stated my preference, but I grant that they come to the table without such commitments for a reason: there will never be agreement, and such fundamental disagreements can only frustrate an international order committed to the entities (rights) over which there *is at least some broad agreement*. Later, in making my case for human worth, human rights, and claims to such things as race reparations, I lean into what I call a "Rawlsian maneuver"—but it could just as easily be called a "Beitzian maneuver." At some point, barring a miraculous breakthrough in the disagreement surrounding why, exactly, humans enjoy moral significance and have the rights we have, we have to get on with the conversation about the human rights that are widely accepted and what they mean for us today in our deliberations about justice and everyday life. So while in my account, in an effort to provide a moral theory of rights I start with a

more fundamental discussion of where rights come from and why they are normatively forceful, I grant here that much of the discussion to be had is a strictly political discussion—a matter of radically different societies and people needing to get along with one another. And I grant that the more fundamental moral account I offer can be anathema to that political discussion.

Consider this paper an attempt to fuse the two projects—I *do* wish to provide a sensible account of what human rights are and where they come from, but by doing that I *do not* wish to curtail the meaningful discourse and overlapping consensus that can be had by thinkers from a broad array of inconsistent moral, religious, and political worldviews. In this paper, where my accounts of human worth, humanity, and human rights reach their fundamental terms and become dogmatic and disagreeable, I will be happy to cordon off those underlying moral commitments and lean into what overlapping political consensus there is to be had at the higher level. That is, whether one accepts my Wolterstorffian account or not, we may lean forward into the general agreement surrounding the moral considerability of humans and the entities we call “human rights.”

#### E. Looking Ahead

Hohfeld and Wenar offer their descriptive and functional analyses of rights, according to which rights serve one of various functions. They describe rights as coming in the form of one of four incidents, or as a “complex molecule” of these four incidents—privileges, claims, powers, and immunities. I briefly introduced my own Wolterstorffian view, according to which all rights are claims one has in distinct moral contexts, and the claims one has in a given context are waivable only by oneself. Wenar characterized the rights-terrain as divided roughly into two schools—will theory and interest theory.<sup>89</sup> The categorization of these various rights theories into the broad categories “will theories of rights” and “interest theories of rights” is a functionalist

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<sup>89</sup> Wenar, “Nature of Rights.” For examples of the will theory, again see Kant, *Critique*; Hart, *Concept of Law*; Steiner, *Essay on Rights*; and Sreenivasan, “Duties.” For examples of the interest theory, again see Mill, *On Liberty*; Lyons, *Mill’s Moral Theory*; Raz, *Practical Reason, Morality of Freedom*, and *Public Domain*; Kramer, “Getting Rights Right,” and MacCormick, “Children’s Rights” and “Rights in Legislation.”

project aimed at discerning the sorts of things that rights *do*. My account of rights is most at home in the interest theory of rights tradition, although it shares common ground with the demand theories of Darwall and Feinberg—human worth as conceivable in the terms of “a case meriting consideration,” or as an inescapable reason for acting in thus and such a way regarding another. Deontological and consequentialist moral theories provide their own moral frameworks, with different moral entities and first principles than rights at the foundations of their views. But the Kantian and the utilitarian, within their respective moral frameworks, both reserve critical spaces for rights. In Kant’s case, space is reserved for the right *liberty*.<sup>90</sup> In the case of Mill, work is done to reconcile our intuitions about justice and our intuitions about expediency—cases of justice and cases of expediency ultimately align in Mill’s view. Beitz rejects this project of providing a moral account of rights and opts for the more political approach of building out from what overlapping consensus can be found regarding rights.<sup>91</sup>

I hold that human rights (thought of as supervening on human worth in particular socio-moral contexts) get at the substance of our moral relations to one another in ways that considerations of the collective good, social contract, moral laws, ideal observers, or human status properties like “autonomy” or “consciousness” simply cannot. In what follows, I endorse much of what Nicholas Wolterstorff has to say about rights, according to which *justice* itself is properly understood in terms of respect for human worth (in terms of whether or not rights-holders are granted that to which they have legitimate claim). Under this view, rights are intrinsically social moral properties had by humans that are authoritative in virtue of our (humans’) tremendous worth, worth that is inherent and not had in virtue of some alienable property or capacity of the rights-holder. Wolterstorff’s is a theistic account, but it need not be.<sup>92</sup> In addition to an alternative theistic understanding of Wolterstorff’s work, I will provide a secularized version of Wolterstorff’s work. It is with this Wolterstorffian framework of rights at the

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<sup>90</sup> Kant, *Critique*.

<sup>91</sup> Beitz, *Human Rights*.

<sup>92</sup> Wolterstorff, *Rights and Wrongs*.

bottom that I will attempt to answer the broader questions about justice and what is owed to individuals and communities who have been traditionally wronged.



## Chapter 2: A Wolterstorffian Take on Human Worth and Rights

### A. The Wolterstorffian Rights Framework

Nicholas Wolterstorff's political theology features a robust account of rights according to which inherent human rights inhere in human worth.<sup>93</sup> Wolterstorff conceives of human rights as being normative social relationships.<sup>94</sup> Justice and injustice, according to his view, are reducible to talk of respect (or disrespect) for the worth of rights-holders, to talk of subjects getting (or not) that to which they have legitimate moral claim. One's being *wronged* is a matter of one's being treated, or one's being withheld some good, in a manner that does not properly respect or comport with one's worth. It is the objective worth of human subjects that provides the normative force of the claim-rights that demarcate the just and unjust treatment of those subjects. In my account, *respect for a rights-holder's worth* amounts to some moral agent rendering to the rights-holder those life-goods and ways of being treated (or not) to which she has morally legitimate claim. Important to note: Wolterstorff does include others refraining from treating the rights-holder in certain ways in his concept of life-goods. Wolterstorff also develops an account of the Judeo-Christian notion of *agape* love, and his primary claim in his examination of *love* is that the works of justice are a subspecies of love. That is, rendering justice to our neighbor is just one way to love our neighbor.<sup>95</sup>

I embrace most of what Wolterstorff argues in his political theology; however, in Chapter 3, my account will provide two alternative ways of understanding his claim that humans are

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<sup>93</sup> Later in this chapter, we will see that Wolterstorff specifies he conceives of the relation between worth and rights to be that of *inherence*. He claims human rights *inhere* in human dignity. But more broadly, rights are either grounded in worth, or they inhere in worth, or they reduce to talk of worth, or they supervene on worth. I explicitly endorse the latter, although it is not my intention for my view to preclude a more substantive metaphysics that hashes out a grounding relation of human rights in the property *humanity*, or the inherence of human rights in human worth. Supervenience is a modal relation that specifies that certain more fundamental facts underlie certain higher-level facts, and that those more fundamental facts invariably account for the higher-level facts, unconditionally.

<sup>94</sup> Wolterstorff (2010, pg. 4) equates rights with normative social relations, but does not explicitly preclude there being other sorts of normative social relations, see *Rights and Wrongs*, 4.

<sup>95</sup> Here, I take it Wolterstorff means that "doing justice" is a way to love somebody. So, whether or not one characterizes their relation to another in terms of love, doing justice is a *loving thing to do*. See Wolterstorff, *Justice in Love*.

inherently valuable. One way is a secularized Wolterstorffian account, and the other way will be one-part critique and another-part refiguring of the theistic relational property Wolterstorff posits in order to account for inherent human worth. I provide the alternative theistic story, because it is sounder than the theistic story Wolterstorff tells. And my reasoning for providing a secularized version of Wolterstorff's work is twofold: first, I myself am partial to Wolterstorff's theism, but I acknowledge that it will likely be more dialectically effective to locate my rights-first theory of justice in a non-theistic framework. In the spirit of Rawls's work on *overlapping consensus*,<sup>96</sup> I find it helpful to organize my pursuit here by the guiding standard of developing a theory of justice that people with radically divergent core theological or metaphysical commitments can endorse from within their own private worldviews. So, while I find very much to agree with in Wolterstorff's theistic metaphysics and political theory, I plan to forgo their necessary appeals to a theistic account of human worth. And second, as the reader will see in this chapter, there are some serious inconsistencies in the foundation of Wolterstorff's original theistic attempt to account for rights, and those need to be addressed. In highlighting these problems, I hope to demonstrate why my secularized *Wolterstorffian* take on rights is preferable to the original, and even to the theistic alternative I will offer. If the reader prefers the alternative theistic story I offer to the secularized version of Wolterstorff that I offer, the reader will be free to proceed according to his or her preference. What I seek to provide with the alternative accounts is an acceptable accounting for *human worth*, each for the theist and the atheist (or agnostic); the rights-first theory of justice that I develop needs one or the other to get it going.

Here is a quick sketch of my Wolterstorffian framework (I will indicate where my theory breaks from Wolterstorff's theory): humans have all different sorts of rights, some of which are conferred or the product of convention and some of which are inherent. Our inherent rights are morally salient and authoritative in virtue of the worth that we have in virtue of various capacities

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<sup>96</sup> Rawls, *Justice as Fairness*.

or properties (some essential, some not) of ours.<sup>97</sup> The properties or capacities that are responsible for our worth can be properties that obtain of us that are conventionally established, conditionally conferred, bestowed, or had only contingently; but as we will see later, in order to account for the ineradicability of at least some of our inherent human rights, it would do us well to conceive of our human worth as depending on at least some properties or capacities that *are* essential to us, or that are necessarily true of us (as in, the relation of God to God's human creatures that Wolterstorff posits). Wolterstorff takes *God* to be responsible for establishing that which should be considered "life-goods" for us, because in his view one thing that is needed is for these life-goods to be reified and for our claims about them to be objective. But in the interest of forging overlapping consensus, I suggest this secularized tweak: in virtue of the kinds of things we are (human things, with our array of properties and capacities), certain objects, states of affairs, and treatments are objectively "goods" for us. *Contra* Wolterstorff, we can appeal to these objective facts about humans, without appealing to God at all, to come to conclusions about that which is *good* for humans. And Wolterstorff would agree with this next step: they are life-goods, because they, in themselves, add positive value to our lives and safeguard our well-being.<sup>98</sup> So, according to my Wolterstorffian view, in virtue of the kind of things we are (human things, with the array of properties, capacities, and needs we have), we have legitimate claims against others to certain "life-goods" (objects, states of affairs, treatment, etc.) that safeguard our well-being. Wolterstorff takes it these legitimate claims to certain "life-goods" *just are* our rights; and I accept that. These morally legitimate claims against others in

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<sup>97</sup> Wolterstorff, *Rights and Wrongs*, 36.

<sup>98</sup> All this talk about life-goods evinces talk of the consequentialist's notion of *interests* and their views about the normative significance of interests—but there is a fundamental difference between the consequentialist's view and Wolterstorff's view. The consequentialist would prefer something like: a rights-holder is morally considerable because they have interests, or rather that a being's moral considerability is derived from that they have interests, and the moral status of actions is determined by reference to their consequences *vis-à-vis* our interests. But according to the Wolterstorffian view it is not the case that one is morally considerable (i.e., has the worth that one has) *because one has interests*, or *because others' actions affect our interests*; rather, one has interests and legitimate claim to the life-goods those interests pertain to *because one has the requisite worth and the normatively binding claim that worth generates (i.e., moral considerability)*. So, in the Wolterstorffian framework, moral significance is prior to interests, rather than being derived from interests in some way.

turn obligate other moral subjects to treat us in certain ways and *not* to treat us in certain other ways; the duties and obligations are normatively forceful, because of that morally significant fact about us, our worth. Worth commands respect and regard.

In Wolterstorff's account, both the rights one has and the obligation of others to treat one in some ways but not others inhere in one's human dignity. Shortly you will read Wolterstorff's claim that justice itself is "grounded on" human rights, and he elucidates the relation between worth and *rights* to be that of inherence. But later, I will opt for a supervenience relation, rather than speaking in terms of rights being "grounded on" or "inhering in" worth; I take *the supervenience of worth on some property and the supervenience of a right on that worth* to be a more illustrative set of relations than *the inherence of worth and rights in some property*, but I take it that not much hangs on the difference between supervenience and inherence. The term "justice" in both Wolterstorff's view and in my variation of his view pick out states of affairs in which

- a. human individuals are given that to which they have a right as commanded by their worth, and in which
- b. human individuals act in accord with the legitimate claims others have on them.

When I violate someone else's right, my moral status is that of *blameworthy*; the moral status of the person whose right I have violated is that of *wronged*.

So we have my general Wolterstorffian view, from bottom to top: Humans have (1) various properties on which (2) human worth supervenes,<sup>99</sup> and this worth commands respect, by which we just mean that the (3) morally legitimate claims to (4) certain life-goods that are due a rights-holder of thus and such a sort (as dictated by facts about that which *actually* safeguards

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<sup>99</sup> Wolterstorff, remember, opts for the inherence of worth in properties. I do not think the inherence relation he posits and the supervenience relation I posit are necessarily contradictory; I do think the supervenience relation is more illustrative.

a rights-holder's well-being)<sup>100</sup> are claims that ought to be respected and regarded. Things of sufficient worth are *owed* these life-goods, in the sense that they *ought* to be treated in the ways established by their claims—this is a feature of *worth*. States of affairs characterized in terms of respect or disrespect for those claims are to be considered (5) *just* or *unjust*, respectively. What it means to be wronged is that one's worth has been disrespected, that one's legitimate claims have not been met; what it means to be a victim of injustice is that one's rights have been violated. So, in my view, our human rights are moral properties that supervene on our worth (together with facts of the matter about our interests), which supervenes on morally relevant human properties, capacities, achievements, etc. Inherent rights supervene on human worth, but other conventional rights may supervene on personal achievement, historical incident, etc. One example may be the right to act as an authority on a matter—one's PhD, not one's human worth, serves as the basis for that particular right. One's accomplishment, in that case, is a property that one has that lends new rights, new grounds for respect. But these sorts of rights are not *inherent human rights*, which are the primary focus of my discussion, and neither do they supervene on human worth *simpliciter*.

Worth makes claims normatively forceful. Worth "authorizes" the claims that obtain in particular moral contexts and I take this relation of rights-to-worth to be another supervenience relation. Claim-rights supervene on that worth, in particular socio-moral contexts, and on the facts of the matter about which goods and treatment *really are* life-goods for the rights-holder. My view: without worth there remain facts of the matter about which goods and treatments *would* promote a putative rights-holder's well-being were the rights-holder to be granted those goods and treatment, but without worth there is no moral fact to authorize or generate a morally legitimate and normatively binding claim to those life-goods.

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<sup>100</sup> Here, Wolterstorff would insist that these life-goods are established by God, but I think that particular theistic commitment is unnecessary. God is sometimes a helpful backstop, but if the goal is to come up with relatively uncontroversial claims about that which is a life-good for things like us, I do not think Wolterstorff's theistic appeal is needed.

In his account of rights, Wolterstorff emphasizes the intrinsically social nature of claim-rights:

I will defend the importance of justice and the importance of rights, in the context of defending the thesis that justice is ultimately grounded on inherent rights... Rights are normative social relationships; sociality is built into the essence of rights. A right is a right with regard to someone... Rights are toward the other, with regard to the other. Rights are normative bonds between oneself and the other... those normative bonds of oneself to the other are not generated by any exercise of will on one's part. The bond is there already, antecedent to one's will, binding oneself and the other together. The other comes into my presence already standing in this normative bond to me. This normative bond is in the form of the other bearing a legitimate claim on me as to how I treat her, a legitimate claim to my doing certain things to her and refraining from doing other things.<sup>101</sup>

Throughout Wolterstorff's work, he entertains accusations against the rights theorist that talk of rights is somehow inappropriate—that it smacks of “possessive individualism,” a so-called vice characteristic of Enlightenment scholars whose work on rights is inaccurately hyper-individualistic.<sup>102</sup> But Wolterstorff contends, as against the anti-rights crowd, that those who conceive of rights as being hyper-individualistic have only conceived of rights inaccurately in the first place. Rights, after all, are *intrinsically social moral entities*, and “sociality is built into the essence of rights”—how could rights thus conceived smack of possessive individualism? To speak of rights is to speak of individuals who are intrinsically socially situated, their duties and claims held in virtue of the existence of other socially situated individuals and the standing socio-moral relations between them.

And that individuals have rights certainly does not preclude that groups, organizations, or States have rights. Wolterstorff calls on the rights theorist to recognize that individuals are socially situated and to seek the boundaries and rules for right action for moral agents in light of their social situation. Wolterstorff claims that rights are not a product of some act of will on the part of the rights-holder—“the other comes into my presence” carrying his or her claims against

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<sup>101</sup> Wolterstorff, *Rights and Wrongs*, 4.

<sup>102</sup> Wolterstorff, “Social Justice.”

me.<sup>103</sup> So we have a picture of rights as being intrinsically social facts, claims made not in virtue of the rights-holder's capacity or exercise of will but rather in virtue of the rights-holder's worth and social situation. A discussion of an individual's rights is, necessarily, a discussion of an individual's sociality.

A potential worry: could rights enable a person to pursue his or her claims even at the cost of causing distress or pain to others? My answer: *No, or at least not without warrant*. A right that would entitle one to violate another's morally legitimate claims to being treated in some ways but not others *is no morally legitimate claim at all*, and one's morally legitimate claims certainly would not entitle one to violate another's morally legitimate claims to being treated in some ways but not others. The morally legitimate claims of two rights-holders ought both to be considered and prioritized, and rights-holders are always protected by their worth and morally legitimate claims against unwarranted pain or distress; when an individual putatively acts on a claim in a way that causes unwarranted pain or distress, that individual is acting contrary to what respect for the other demands.

Wolterstorff is committed to the existence of different *kinds* of rights (although, he never explicitly names them particular *kinds* of rights), with each kind of right associated with a particular *kind* of origin story. Covered in Wolterstorff's account are categories of rights that will be familiar to the reader—contract rights, legal rights, natural rights, etc. But Wolterstorff is most concerned with inherent human rights. Here, again, is Wolterstorff:

The inherent rights theorist agrees that many of the rights we possess are possessed on account of something conferring them on us—some human agreement, some piece of human legislation, some piece of divine legislation, whatever. But he holds that, in addition, we possess some rights that are not conferred, some rights that are inherent. On account of possessing certain properties, standing in certain relationships, performing certain actions, each of us has a certain worth. The worth supervenes on being of that sort... And having that worth is sufficient for having the rights.<sup>104</sup>

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<sup>103</sup> This is a rejection of will theories of rights, which posit that rights are exercised by an act of will, or are derived from a capacity of will. It is not necessarily a rejection of demand theories, however—demand theorists do not posit that rights are derived from acts of will or capacity of will. Wolterstorff's concept of rights makes rights antecedent to a rights-holder's volition.

<sup>104</sup> Wolterstorff, *Rights and Wrongs*, 36.

So, Wolterstorff also insists here on the existence of inherent human rights. Throughout the Wolterstorff literature, the definitions of some of these key terms are a bit ambiguous. But here I will attempt to provide what I take it Wolterstorff means by some of these key terms, in the best lights of his own theory; if this is not what Wolterstorff means, I think it is what Wolterstorff *ought* to have meant, and in my Wolterstorffian account it is what I shall mean.

Rights come in two fundamentally different kinds: conferred rights and inherent rights. Conferred rights are thought to be held by rights-holders in virtue of some conferral—by some treaty, law, human contract, social contract, or divine proclamation. Then, under Wolterstorff's view, conferred rights ought to be conceived of as coming in two further varieties: conventional rights and natural rights. Natural rights are conceived of as those conferred rights that are not conferred by some human action or social convention; rights established by divine fiat and activity, or by some objective moral law, are examples of natural rights.<sup>105</sup> Conventional rights are properly conceived of as rights that are conferred by human social agreement (by a law, contract, founding document, etc.). These rights—both conventional and natural—are all *conferred* rights in virtue of their ground or supervenience base being, in some sense or other, *external* to the rights-holder (as in the case of a law or contract); that which is ultimately responsible for these rights is not some property that inheres in the rights-holder.

We have defined conferred rights, of both the conventional and natural varieties. That leaves us with inherent rights. In contrast to conferred rights, inherent rights in a Wolterstorffian view are properly conceived of as those rights that supervene on something internal to the

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<sup>105</sup> The “divine right of kings” is an example of a natural right. It was neither an inherent human right nor a conventional conferred right, but rather was thought to be a right conferred by God to one ruler, by divine fiat. The rights God gives to rights-holders, under this view, are natural rights. Other natural rights include the rights and duties that come with natural roles, like parenthood, which are neither inherent human rights nor conventional conferred rights; these are rights that are proscribed by natural facts about these relations and the moral laws or rules associated with them. Natural rights are those rights that are conferred, but not through human agreement or social contract.



rights-holder (namely, the rights-holder's *worth*, conceived of as supervening on different human properties, capacities, or accomplishments).<sup>106</sup>

We should make an important distinction here, with the foundation of Wolterstorff's view in mind: there are the relations themselves that we stand in *vis-à-vis* others, and then there is the *worth* that supervenes on some relational property we may have.<sup>107</sup> If one has some right in virtue of their standing in some relation to another (as in, a "friend" or "colleague" or "employer" relation), that right should be considered conferred; the *relation itself* should not be considered inherent to the rights-holder, and if the right is a product of the relation and not some worth that supervenes on some other property of the rights-holder, the right should be considered conferred.<sup>108</sup> But, Wolterstorff's view insists (and I will argue against this): if one has some right in virtue of their having worth that supervenes on a relational property of theirs (as in, the "friend to God" relational property that Wolterstorff's account of human worth will rely on), then the right should be considered inherent. I take Wolterstorff's notion of "bestowed" worth to be just that

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<sup>106</sup> As I have said, I hold that Wolterstorff should have opted for the supervenience relation.

<sup>107</sup> This is a Wolterstorffian distinction that I do not abide by. I do not think human worth supervenes on any relational properties whatsoever. Strictly speaking, Wolterstorff never claims that worth *supervenes* on or is *grounded* in relations, either; but he does claim that worth can be *bestowed* by certain relational properties, like relation to God. I have claimed, here, that the distinction between a relation itself and the worth that may supervene on that relation is a Wolterstorffian distinction, and I mean that only in the sense that

- a. I think Wolterstorff ought to have opted for the supervenience relation of worth on human properties, and
- b. had he gone that supervenience route, the distinction between a relation itself and the worth that supervenes on that relation would be an important distinction in his account.

It would be important in his account because he is trying to offer an account of human worth and inherent human rights, and his claim is ultimately that the human worth that generates inherent human rights comes, somehow, from our relation to God. More on this as the chapter unfolds, but I reject what I have here called the "Wolterstorffian distinction" because I reject that worth supervenes on relational properties. I will reject the broader project of appealing to relational properties in order to account for human worth largely because it would be bizarre to say that humans are valuable not in virtue of some set of facts about them, but rather in virtue of their relation to some other thing (even God) or in virtue of some set of facts about another entity to which they are related. As for Wolterstorff's "bestowal" concept—what is the difference between *worth that is bestowed by a relation* and *worth that supervenes on a relation* (or *worth that is grounded in a relation*)? The reader's guess is as good as mine. For now, let us just stipulate that what Wolterstorff means by "bestowed worth" is "worth that supervenes on 'bestowed' properties, like a relation."

<sup>108</sup> There is an assumed distinction here between natural kin relations like *parenthood* and socially constructed relations like friend or colleague or employee. In furtherance of a distinction, I find it helpful to hold kin relations like *parenthood* and *childhood* to be immutable and essential, whereas the merely social relations like friend or colleague are highly contingent.

kind of worth—the worth an individual has that supervenes on some (bestowed) relational property.

Rights that supervene on the worth that supervenes on the rights-holder's non-relational properties are definitionally inherent rights, because an individual's properties are inherent to the individual. The distinction just made—that between rights that are the product of some relation and rights that are the product of the *worth* bestowed or conferred by some relation—is a critical distinction when it comes to the story Wolterstorff tells about why, exactly, he thinks humans are immensely valuable. He will argue that inherent human rights are accounted for with reference to a critical relation to God that “bestows” worth; but I will argue that is not how we should think of inherent human rights, because relational properties (that is, our spatial or social relations to another and to God) do not inhere in individuals as other more standard properties do. It is my view that no relational property can be responsible for the kind of human worth that concerns the inherent human rights theorist. Inasmuch as relational properties figure into talk of rights, rights that are derived from relations should be considered to be conferred rights.<sup>109,110</sup>

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<sup>109</sup> Some rights that are derived from relations will be “conventional” conferred rights (as in, the rights that come from a human legal contract), and some will be natural rights (as in, the rights that come with parenthood). It is a definitional stipulation that parenthood rights are natural rights, and therefore conferred rights. The controversy here is a matter of how to sort our rights categories: it seems *strange* to say that parenthood rights, for instance, are conferred. My response: parenthood rights are natural rights and therefore conferred rights, definitionally. The parent-to-child *relation* is external to the rights-holder. And the reason it seems strange to say that parenthood rights are conferred is because it seems clear that those natural facts about us that make us parents and children are facts that are *internal* to the rights-holder. But when it comes to accounting for parenthood rights, we should refer to the parenthood *relation* to explain the rights and duties of parents, not to those relevant and interesting biological facts that make us parents and children. When asked, “Why are you allowed to discipline your child and I am not?” it would be off base to refer to some biological fact; you should, rather, refer to your parent relation to the child. Indeed, many parents (or guardians) do not have a relevant biological property that *makes them that particular child's parent*, yet they have parenthood rights and duties nonetheless. So, the facts that make us parents or guardians can be either natural or socially established, but it is the parenthood *relation* or guardianship *relation* that accounts for the rights.

<sup>110</sup> In a comment on a draft of this paper, Professor Jacob Adler remarked that Jeremiah 31:3 describes God's love as everlasting or eternal. So, Professor Adler points out, if conferral is a temporal process, God's love is not conferred. My response: conferral is not a necessarily temporal process. It can be a temporal process, but “conferral” can also describe a logical entailment or relation. The Queen can knight an individual and thus confer new rights and privileges *in time*. However, it can also be that God's love is

Beyond the foundational issue with relational properties and the rights they may or may not account for, there is other interesting ground here to explore.<sup>111</sup> A taxonomy of rights that carves out space both for rights that are conferred and rights that are had in virtue of inherent worth comes with some interesting returns. For example: take the president of the United States of America and any rights she may have. Surely, the president of the United States (let us name her, stipulatively, “Elizabeth Warren”) uniquely holds some conferred rights in virtue of Constitutional strictures and law—factors which ought to be conceived of as strictly social and conventional. President Warren’s right to command the United States Armed Forces would be one such example.<sup>112</sup>

Next, surely President Warren uniquely holds some *other* rights in virtue of the unique *worth* that accrues to an individual in virtue of their being the sole current president of the United States of America (or a former president, for that matter). Examples of such rights might be the right to be consulted on important matters of State, privileged access to matters of state or ambassadorial duties, the right to be given deference, the right to be obeyed or followed by citizens, the right to be respected to a magnitude enjoyed by no other citizen, etc. One might posit that the previous occupant of the Oval Office serves as a fitting counterexample to the immediately preceding. Perhaps, one might think, President Donald J. Trump is not describable in these terms. That is, perhaps even though doubtlessly the former president, this man will not have maintained those new grounds for respect *qua* president. Political convictions aside (but moral convictions not aside!), this raises interesting questions about whether an office holder can engage in behavior that nullifies their rights to be treated in the various ways that their occupation of that role would traditionally have granted. I am willing to concede that a former or current president of the United States can demean themselves and their office to such an extent

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atemporal yet still characterizable in terms of *conferral*, given that the *love relation* of God to God’s human creatures is, very strictly speaking, external to the beloved.

<sup>111</sup> There will be more on the problem with relational properties in the next two sections.

<sup>112</sup> It is worth mentioning that this would characterizable also in terms of a Hohfeldian “power-right.”

that the new grounds for respect that their unique office would typically have granted them are nullified. Of course, there is a matter of fact about whether or not Donald Trump has done this—some will say he has, and some that he has not. One of those camps will be objectively wrong about the grounds for respect possessed by Donald Trump *qua* president. To be sure, however, no conduct of any president can nullify the grounds for respect they possess as a human being. So, as I speak of the rights a president gains with respect to the unique worth they attain in virtue of their presidency, that particular worth should be conceived of as alienable. I could employ the common locution—“He acts beneath the office of the presidency”—to describe those cases in which a president or former president can be said to have foregone the grounds for respect they otherwise would have been entitled to.

And that role-bestowed worth is real—in Wolterstorff's view, achievements, accomplishments, and historical facts about people are properties of theirs on which worth can supervene, and one's inhabitation of the office of the presidency would be considered one such achievement, accomplishment, or meritorious role. In addition, President Warren would have the full suite of human rights that any other human has due to the worth that supervenes on critical facts about their humanity. So, some of the rights President Warren has in virtue of her worth will be merely human rights—rights had in virtue of the tremendous worth President Warren has *qua* human (as in, Elizabeth Warren's right not to be treated cruelly and inhumanely). But other of the rights President Warren has in virtue of her worth will be rights that the president has in virtue of a worth that is *unique* to whoever occupies the presidency; such rights arise from a worth that is the president's exclusively, and the relevant worth is alienable. To wit: some of the president's rights are strictly conventional and obtained with the role “president,” some are inherent human rights shared in common with the rest of us in virtue of every rights-holder's tremendous worth, and some are rights enjoyed uniquely by the president in virtue of the unique worth she possesses that supervenes on certain historical facts about her.

So, you and I have some duties with regard to President Elizabeth Warren in virtue of strictly conventional factors (as laid out by laws and norms), and another set of duties with regard to President Warren in virtue of the president's inherently valuable humanity, and another set of duties with regard to President Warren in virtue of the worth that accrues to her by accomplishment or role (namely, that she is the president of the United States of America). Interestingly, the value that accrues to the individual in virtue of their being the chief executive is just as morally significant as the value that accrues to the individual in virtue of their being human, but the role itself of *chief executive* is strictly conventional. One might wonder: is the worth that accrues to an individual in virtue of their being the sole president inherent worth, or something else? How could the rights that supervene on that worth be conceived of as inherent, in the same way that our suite of human rights is to be conceived of as inherent? I do not have a satisfying answer to that question, other than to say, simply, that properties are properties. Inasmuch as Wolterstorff is right that certain achievements, accomplishments, or roles can be conceived of as an individual's properties, and inasmuch as those properties can be conceived of as supervenience bases for worth, then it is conceivable that President Warren has some inherent rights (like that of being treated deferentially) contingent upon her possession of the worth that supervenes on these historical facts about her. I have already granted that the unique *presidential worth* is alienable. It can be lost or trumped, perhaps in such cases as when there is behavior that fails to attain to the dignity of the office, in ways that normal human worth cannot be. But I contend that the Wolterstorffian taxonomy stands intact: the rights that supervene on our worth *qua* president and the rights that supervene on our worth *qua* human would both be considered inherent. It follows from all of this that some inherent rights, at least, are alienable, but I am not bothered with that output.<sup>113</sup>

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<sup>113</sup> The word "inherent" is ambiguous. Inherent can stand as the opposite of "acquired" and it can stand as the opposite to "relational." Nothing much hinges on this ambiguity in my work.

In all cases, an individual's worth supervenes on properties that are inherent to that individual—whether it is worth that accrues to an individual in virtue of their status as human, or whether it is worth that accrues to an individual in virtue of some conventional role they fill or some property they gain via life accomplishment (or whatever). All the rights, then, that supervene on worth are to be considered inherent rights.<sup>114</sup> And all of the complexities of the taxonomy of rights on hand notwithstanding, we should simply accept that certain roles or conventions—like that of the role *president of the United States of America*—will give to an individual like President Elizabeth Warren both some conferred rights in virtue of her occupying the conventional role and an increased measure of alienable worth associated with that role (on which certain new inherent rights may supervene).

In my model, human rights supervene on the human worth that supervenes on a certain essential human property, rather than rights supervening directly on that property, for two reasons. First, were I to conceive of rights as supervening directly on properties, without the added element of human worth, I would be forced to account for why human rights that supervene on some property (essential or not) obtain for humans but do not obtain for other things that have that same or similar properties (as in, some capacity had by both humans and bears, but to some lesser extent in the bear). The claim that humans have some property on which human worth supervenes does not entail that non-humans lack that property; however, if the property on which the relevant human worth supervenes is taken to be unique to humans, like the property *humanity* that I will consider later, then it *would* of course be entailed that non-humans lack the property, along with the worth that supervenes on it and the human right that supervenes on the worth. Needed is an explanation for why humans have human rights, and non-humans do not; and it is here that the importance of human worth is apparent. It is human worth, and not some other sort of worth, that supervenes on the properties (essential or not) of

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<sup>114</sup> And human worth does not supervene on relational properties, so relational properties are not an appropriate foundation for a view of inherent human rights.

humans, and it is human rights that supervene on that human worth; this explains why non-humans do not have human rights, though they may have properties and capacities very similar to those had by the human rights-holder.

But note that nowhere do I claim that other things or beings do not have rights; rather, I claim that humans have human rights, exclusively, because human rights supervene exclusively on human worth. Other non-human entities have worth and rights, too, (for instance, an animal's right to not be harmed without warrant) so we can still think of their treatment and mistreatment in the terms of "justice." And the supervenience of human rights on human worth is a better model than the supervenience of human rights directly on certain human properties for a second reason: the worth of humans gives the claims that supervene on that worth normative significance. Were claims thought to somehow supervene directly on some natural property, we would be left needing an account for how a right could be normatively forceful (or *why* it would be normatively forceful), given its strictly natural, amoral base. Instead, we can talk of human worth with the common understanding that worth, dignity, and value are normative entities, and we can conceive of the entities that supervene on those commonly understood normative entities to also have normative import. So, in my view worth authorizes claims, legitimizes them, and makes them normatively forceful. Worth adds to natural facts of the matter about humans and those life-goods which are legitimately in their interest (or secure their well-being) a normative force that cannot be attained by bootstrapping from strictly natural facts of the matter. So, basing human rights on human worth allows us to explain why only humans have human rights, it allows us to explain why *every* human has human rights, and it allows us to explain why human rights are normatively forceful. I take the normative character of objective human worth—that it commands respect—to be a basic fact about human worth.

#### B. Wolterstorff's Theistic Account of Human Worth

The issue of whether or not relational properties can give rise to inherent human rights is an issue for Wolterstorff's account of how inherent human rights are accounted for, because

Wolterstorff ultimately accounts for the suite of inherent human rights in the worth that is *bestowed* upon a person by the relevant relation to God. That we are *in the requisite relation to God* is the worth-bestowing relational property that accounts for our inherent human rights, our relation to God purportedly giving rise to a new status and new claims of ours to certain treatment.<sup>115</sup> Wolterstorff claims that the worth upon which a person's inherent human rights supervene is a worth that is *bestowed by God*,<sup>116</sup> a claim that is problematic. That bestowed worth would be neither essential to humans conceptually prior to their relation to God nor established by convention. But he makes such a claim for want of an appropriate base or ground for human rights, after arguing that all preceding grounding accounts are inadequate or seriously problematic—he systematically rejects the various properties and capacities that are constitutive of the human nature as appropriate grounds for inherent human rights.<sup>117</sup>

In saying that worth can be bestowed, we are committed to saying that there are certain properties and relations that are responsible for that bestowal; otherwise, the worth that is “bestowed,” independent of any bestowed property or relation on which that worth could supervene, would be arbitrary. Such arbitrary worth might be something like a worth assigned by *fiat*—but surely we should resist arbitrariness when conceiving of the worth a person has that may or may not generate their rights. Certainly, we do not want our normatively binding social relations—our rights—to be conceived of as supervening on a bit of arbitrary fiat-worth. Such

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<sup>115</sup> Wolterstorff, *Rights and Wrongs*, 360.

<sup>116</sup> Wolterstorff does not clearly define what worth bestowal amounts to, but I will let that lie. As I said before, probably “bestowed worth” amounts to the worth that supervenes on bestowed or conferred properties (like relations). Here lies my primary objection to the story Wolterstorff is trying to tell: how could a relational property, a purportedly morally significant relation that all told is external to the rights-holder, be responsible for any human worth at all in the rights-holder? What property of the individual, upon which the relevant worth would supervene, would that relational property be? I think this core claim of his fails, so I will offer a different explanation. I do not think relational properties like the one offered by Wolterstorff can produce the human worth he's looking for in his account—although surely relational properties could confer some rights. For want of an alternative, I will offer a secularized version of all of this that does not rely on Wolterstorff's theistic claim here, and I will offer a different theistic relational property—the child-parent relation of rights-holders to God, a constituent part of which includes *some real property of the rights-holder*—that I think *could* more plausibly account for the inherent worth Wolterstorff is looking for. This will give the reader two options: a secular version that ignores Wolterstorff's theistic foundations, and a slightly modified theistic Wolterstorffian account.

<sup>117</sup> Wolterstorff, “Secular and Theistic.”



fiat-worth would not be principled, it would lack an anchor, ground, or base. And it is hard to imagine how an unprincipled worth could be morally salient or normatively forceful. Hence, Wolterstorff's position that the relevant bestowed worth is derived from that critical relational property: God's friendship toward God's human creatures.<sup>118</sup> In a Wolterstorffian framework, this *friendship to God* relation bestows worth (i.e., is a supervenience base for human worth) and serves as a ground for respect.

Before moving into my critique of Wolterstorff's theistic accounting for human worth in terms of this relational property, here are the various high points of Wolterstorff's theory of justice: Wolterstorff calls that to which we have legitimate moral claim "goods"—states of affairs within one's life and history that contribute to the non-instrumental worth of a human's life and history.<sup>119</sup> He argues that classical *Eudaimonism* (a moral theory that centers the good life on human flourishing) does not have the conceptual resources required to account for inherent rights and he develops his own original account of "the good life" called *Eireneism*, a fusion of three central elements:

- i. "the good life" conceived of as the Hebrew concept of *shalom*,
- ii. the fundamental action maxim of "love your neighbor as you love yourself," and
- iii. a tri-structure of rights involving the rights-holder, his interlocutor, and the claim itself.<sup>120</sup>

On his view, well-being, or *shalom*, is intrinsically social, as it depends on whether or not others honor your rights to life-goods.<sup>121</sup> Wolterstorff uses a "divine-desire" standard to define life-goods, according to which the goods constitutive of a person's actual *shalom* are what God desires for that person's life.<sup>122</sup> This is supposed to objectify and reify life-goods, in much the

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<sup>118</sup> Wolterstorff, *Rights and Wrongs*, 360.

<sup>119</sup> Wolterstorff, *Rights and Wrongs*.

<sup>120</sup> This tri-structure is the heart of the claim that rights are *normatively binding social relations*; rights as *claim-plus-moral relation*.

<sup>121</sup> Wolterstorff, *Rights and Wrongs*, 226.

<sup>122</sup> Wolterstorff, *Rights and Wrongs*, 236.

same way that God-bestowed worth is supposed to objectify and reify inherent rights themselves; the divine desire standard establishes that which is the proper object of a claim-right and that which is not. Wolterstorff references Hohfeld's work in endorsing what he calls the "weak Hohfeld thesis," according to which *X has a claim-right against Y only if Y has a duty toward X*, as against the stronger claim that *X has a claim-right against Y if and only if Y has a duty toward X*.<sup>123</sup> It is the case, under Wolterstorff's view, that for every claim-right there is a correlative duty, but it is not the case that for each of our duties there is a correlative rights-holder; we might have a duty regarding a precious work of art, for instance, even in which case it is clearly wrong to say that a painting is a moral patient complete with claim-rights.<sup>124</sup>

Wolterstorff presents rights in terms of respect for the worth of other persons. He emphasizes that justice and injustice are intrinsically social,<sup>125</sup> and he emphasizes that consideration of rights trumps any consideration of "the greater good."<sup>126</sup> When rights-conferring

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<sup>123</sup> Wolterstorff, *Rights and Wrongs*, 250.

<sup>124</sup> I find any view that gives us duties toward inanimate objects—even ones of tremendous value—suspect, although I will grant that, probably, we have duties to at least some things that do not have (human) rights: things like dogs. And I will grant that surely things like dogs do have rights, although they should be conceived of as animal rights, grounded in animal value; and, probably, according to the correlativity principle our duties toward dogs are not the same kind of thing as our duties to other humans, but are rather something like *dog duties*, in a class of moral considerability separate from the class of moral considerability containing human rights and duties. Our "duties" toward precious works of art, for instance, probably ought to be conceived of as duties to the other members of our community or to our community as a collective, to those who have some right to enjoy the precious life-goods provided by the aesthetic value of the art. Though we are duty-bound to treat precious works of art in ways that respect their value, certainly the precious work of art itself ought not be conceived of as making claims against us; precious works of art have social context and import, of course, but they are not *socially situated* in the way that intrinsically social beings are socially situated. We gaze upon them, but do not stand in the relevant moral relation to them. The claims are made upon us by the artist, perhaps, or by those others who behold the art, and (perhaps) those who could some day benefit from the art (or statue, or building, or sacred space, etc.).

Furthermore, Kant's notion of duties of imperfect obligation is operable here, too. Duties of imperfect obligation include a duty to give to charity, for instance, and in at least some cases we should not say that there is a rights-holder who has legitimate claim to that charity. Kant covers imperfect duties both to ourselves and to others.

<sup>125</sup> Wolterstorff, *Rights and Wrongs*, 286.

<sup>126</sup> Wolterstorff, *Rights and Wrongs*, 291.

laws are broken the rights they confer are violated.<sup>127</sup> Every case of one's being *wronged* is a case of one's being demeaned, treated in a way not befitting one's worth.<sup>128</sup>

Precise definitions are lacking here for terms like "respect" and "demean." I will attempt to close those holes here and posit for my view:

*a rights-holder's worth is properly respected if and only if the rights-holder is treated in those ways of being treated to which she has morally legitimate claim and the rights-holder is granted those goods to which she has morally legitimate claim.*

So, what it means to "respect" a rights-holder is that you act in accord with the grounds for respect she possesses; to do otherwise is to demean the rights-holder. Worth provides grounds for respect, by which we mean both that worth is the normative force behind moral claims and that worth generates those moral claims in the right social contexts. Subjects of sufficient worth command respect in just those senses.

Every person has non-instrumental value and should be treated as an end in itself, but not all persons are of equal value.<sup>129</sup> If the reader has fairly strong egalitarian intuitions about the worth of persons, as I do, the reader may initially resist that final claim—that not all persons are of equal value. However, the claim that not all persons are of equal value is not the claim that some persons are very valuable and others are not—it is simply the claim that not all persons are of *equal* value. In Wolterstorff's view, each person is immensely valuable, if only in virtue of God's desire for relationship with them. To further assuage the worries of the egalitarian, presumably God has an equal desire for friendship with everyone, accruing to an equal baseline of enormous personal value. But persons are still significantly different, to the effect that their different properties—life achievements, skills, roles, relations, etc.—accrue to them in different final tallies of worth, from person to person. To soothe the egalitarian, it must

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<sup>127</sup> Wolterstorff, *Rights and Wrongs*, 294.

<sup>128</sup> Wolterstorff, *Rights and Wrongs*, 296.

<sup>129</sup> Wolterstorff, *Rights and Wrongs*, 310.

be insisted that no person is so defunct or boring as to fall short of the baseline of tremendous worth that is bestowed on them by God's desire for relationship with them. I think the non-egalitarian implications of Wolterstorff's view pass muster, without the deleterious inequalitarian effect that some persons ought to be considered morally considerable and others morally inconsiderable. Persons have different final tallies of value, but each person is of sufficient value such that the suite of inherent human rights obtains for them.

According to Wolterstorff, worth inheres in various properties, from which it follows that the task of accounting for rights is that of identifying that property (that relation, that accomplishment, that feature of human nature) it is in virtue of which the worth sufficient for grounding human rights inheres in every human being. Wolterstorff takes to task traditional secular and theistic attempts to ground rights. In his account of justice-as-rights, Wolterstorff devotes a chapter to demonstrating that preceding secular attempts to account for human rights in either human capacities or human dignity have failed.<sup>130</sup> At the end of his chapter, he draws the induction that since all varieties of such accounts to date have failed, it is unlikely that one will prove successful, and for the same reasons that the failed attempts proved unsuccessful. Wolterstorff phrases the challenge this way:

Is it possible, without reference to God, to identify something about each and every human being that gives him or her a dignity adequate for grounding human rights? If not, then what? Some think the challenge can be met. Many think it cannot.<sup>131</sup>

"Secularist" Raimond Gaita formulates Wolterstorff's concern this way:

Only someone who is religious can speak seriously of the sacred, but such talk informs the thoughts of most of us whether or not we are religious, for it shapes our thoughts about the way in which human beings limit our will as does nothing else in nature. If we are not religious, we will often search for one of the inadequate expressions which are available to us...We may say that all human beings are inestimably precious, that they are ends in themselves, that they are owed unconditional respect, that they possess inalienable rights, and, of course, that they possess inalienable dignity. In my judgment these are ways of trying to say what we feel a need to say when we are estranged from the conceptual

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<sup>130</sup> Wolterstorff, *Rights and Wrongs*.

<sup>131</sup> Wolterstorff, *Rights and Wrongs*, 324.

resources we need to say it. Be that as it may: each of them is problematic and contentious.<sup>132</sup>

Wolterstorff begins by dismissing Kant's "capacities" and dignity-based account of human moral status, according to which the reason humans have dignity is their capacity for reason—but Wolterstorff dismisses this on grounds that some human beings clearly lack that capacity, like infants or those with dementia.<sup>133</sup> Wolterstorff dismisses different attempts to place the infant or the incapacitated within "the circle of dignity" by offering and then dismissing different variants of Kant's account: that what may account for human dignity is that *one does or did possess the capacity for rational agency* (but this would leave out infants), that *one is a being such that, if it matures, its maturation includes possessing the capacity for rational agency* (but this would leave out those humans who would not mature as such), or that *one belongs to a species such that maturation of its properly formed members includes possessing the capacity for rational agency* (but this is a strange property that, in fact, some non-humans would possess to some lesser degree). Wolterstorff concludes his dismissal of Kant's capacities account:

I submit that the problem confronting Kant's version of the capacities approach confronts every other version of the capacities approach as well. Whatever capacity one selects, it will turn out that some human beings do not possess the capacity.<sup>134</sup>

Wolterstorff presents and dismisses Dworkin's "secular-sacred" view, on grounds that it, too, fails to account for the worth and rights of every human. Here is Dworkin:

The life of a single human organism commands respect and protection, then, no matter in what form or shape, because of the complex creative investment it represents and because of our wonder at the...processes that produce new lives from old ones, at the processes of nation and community and language through which a human being will come to absorb and continue hundreds of cultures and forms of life and value, and, finally, when mental life has begun and flourishes, at the process of internal personal creation and judgment by which a person will make and remake himself, a mysterious, inescapable process in which we each participate, and which is therefore the most powerful and inevitable source of empathy and communion we have with every other creation who faces the same frightening challenge. The horror we feel in the willful destruction of a human life

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<sup>132</sup> Gaita, *Common Humanity*, 23–24.

<sup>133</sup> Wolterstorff, *Rights and Wrongs*, 329.

<sup>134</sup> Wolterstorff, *Rights and Wrongs*, 330–332.

reflects our shared inarticulate sense of the intrinsic importance of each of these dimensions of investment.<sup>135</sup>

Dworkin's is a secular account and Wolterstorff accuses Dworkin of waxing poetic about the sacred while lacking the metaphysical resources to rightfully invoke the sacred. Wolterstorff points out that the weakness in Dworkin's account stems from its reliance, too, on the assumption that every instance of a human is an instance of "mature properly formed human beings...creative masterpieces of natural creation and self-creation," but this does not account for the worth of the human being who is severely impaired from birth and it does not explain why humans are to be considered quantitatively more "masterful" than things like bears and birds.<sup>136</sup> We should ask, *According to what standard?*, and answers to that question would be subject to the same sorts of counterexamples already covered. Wolterstorff considers Kant to have offered a paradigmatic human dignity- and capacity-based account, and he offers Dworkin as an exemplar of any dignity-based account not grounded in capacities.

Wolterstorff ends with Alan Gewirth's account which uniquely appeals to the capacity of rational agency, but does not appeal to the worth of that capacity or to dignity more generally.

Here is Gewirth's attempt:

First, every agent holds that the purposes for which he acts are good on whatever criterion (not necessarily a moral one) enters into his purposes. Second, every actual or prospective agent logically must therefore hold or accept that freedom and well-being are necessary goods for him because they are the necessary conditions of his acting for any of his purposes; hence, he holds that he must have them. Third, he logically must therefore hold or accept that he has rights to freedom and well-being; for, if he were to deny this, he would have to accept that the other persons may remove or interfere with his freedom and well-being, so that he may not have them; but this would contradict his belief that he must have them. Fourth, the sufficient reason on the basis of which each agent must claim these rights is that he is a prospective purposive agent, so that he logically must accept the conclusion that all prospective purposive agents, equally and as such, have rights to freedom and well-being.<sup>137</sup>

Wolterstorff paraphrases Gewirth:

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<sup>135</sup> Dworkin, *Life's Dominion*, 84.

<sup>136</sup> Wolterstorff, *Rights and Wrongs*, 334.

<sup>137</sup> Gewirth, *Human Rights*, 20.

If I seek to bring about X, then I regard X as good; and if I regard Y as a necessary condition of my bringing about X, then I must also regard Y as good. Now for any purposive action whatsoever, freedom and well-being are necessary conditions of my bringing about what I seek to bring about. So I must regard freedom and well-being as “necessary goods” for me.<sup>138</sup>

Wolterstorff challenges the notion that we always hold the purposes for which we act to be good (citing the drug addict who knows that acting on their addiction is bad or unhealthy but does so anyway) and he points out that these necessary pre-conditions should be regarded as only instrumentally good. I would add the observation that it hardly follows from “freedom is a necessary precondition of my doing what I want to do and your doing what you want to do” that “therefore, every purposive agent has the right to freedom.” Wolterstorff insists Gewirth’s argument is fallacious:

...the argument, at least as it stands, is fallacious. The premises are these: first, I am logically compelled, by reflection on the fact that I am a purposive agent, to think of myself as having a right to freedom and well-being; and second, there is nothing in this line of thought peculiar to me. The conclusion one would expect Gewirth to draw is that I am compelled to think that others are compelled to think in the same way I am about the implications of their being rational agents. But that is not the conclusion he draws. Instead, he says that I am compelled to think that all of us, myself included, *do in fact* have rights to freedom and well-being.<sup>139</sup>

It would be reasonable to expect someone to reason from the existence of these necessary preconditions of practical moral reasoning that *one cannot engage in purposive deliberation or action without the preconditions of freedom and well-being*. But instead, Gewirth skips directly to a conclusion that does not follow from the premises: that the rights themselves to freedom and well-being are derived, by simple deduction, from the mere recognition of those necessary preconditions of purposive action. Wolterstorff ends his discussion of Gewirth by pointing out that even if the argument weren’t fallacious, it would still only work for those humans who are capable of rational agency, and clearly not every human is.<sup>140</sup>

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<sup>138</sup> Wolterstorff, *Rights and Wrongs*, 336.

<sup>139</sup> Wolterstorff, *Rights and Wrongs*, 339.

<sup>140</sup> Wolterstorff, *Rights and Wrongs*, 339.

Wolterstorff challenges “the secularist” to account for that essential, uniquely human feature in virtue of which one has the status *human being*, thinking by this point that it cannot be done without appeal to theistic commitments. Whatever the feature, it must account for both the ineradicability of human rights and the failure of non-human beings to attain to the status *human being*. Otherwise, we are left with a theory of the essential nature of human beings, and a resultant theory of human rights, according to which a human being could *lose* that feature it is in virtue of which they have human rights; or, we are left with a theory of the human nature that does not account for the reality that human rights are unique to humans. If that unique feature could be lost, and if it truly is that feature in virtue of which a human has his or her human rights, then what should be conceived of as ineradicable or inalienable rights are neither ineradicable nor inalienable. Ultimately, Wolterstorff decides that the secularist’s project is doomed to fail, and he closes his book *Justice: Rights and Wrongs* with his theistic grounding.

In a separate article dedicated to showing the inability of other rights theories to account for the ineradicability of human rights, Wolterstorff defines human rights as those rights enjoyed by one in virtue of one’s enjoying the status *human being*.<sup>141</sup> Wolterstorff rejects several secular attempts to ground human dignity: in the capacity for rational agency, in the capacity for personhood, and in the instantiation of human nature.<sup>142</sup> Each of these confers tremendous worth to an individual (and, presumably, gives rise to certain rights), but each of these attempts to ground human dignity in *capacities* fails—counterexamples are abundant of human beings who cannot and will not exhibit rational capacity, personhood, or full-fledged human nature, yet whom we would intuitively judge to have human rights nonetheless. He denies, as well, that the *imago Dei* grounds human dignity—the *imago Dei*, too, can only be interpreted in terms of *capacities* that humans, as a matter of fact, can lose or lack.<sup>143</sup> He points out that bearing the

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<sup>141</sup> As distinguished from “human person rights,” which are those rights that are accounted for by the various properties and capacities associated with personality. See Wolterstorff, “Secular and Theistic.”

<sup>142</sup> Wolterstorff, “Secular and Theistic,” 186–191.

<sup>143</sup> Wolterstorff, “Secular and Theistic,” 194.



image of God *just is* one's possession and exercise of a set of capacities that makes them sufficiently like God.<sup>144</sup> Any account of human dignity that appeals to capacities that can be lacked by some human or other is similarly doomed to fail, whether the account appeals to strictly natural facts or makes appeal to the sacred—human rights are to be ineradicable from every human.

In addition to the accounts mentioned by Wolterstorff, others have attempted to account for human moral status. Maimonides argues that the image of God *just is* human rationality and that lacking the capacity for rationality or the exhibition of rationality is tantamount to lacking a soul.<sup>145</sup> Tooley references the ability of a being to recognize themselves as a subject with a series of continuous states.<sup>146</sup> Feinberg cites capacities to assume duties and responsibilities and to value.<sup>147</sup> Quinn posits that the candidate capacity is the capacity to will.<sup>148</sup> Singer ties the moral status in question to a being's future-orientation and a being's plans being guided by a desired future.<sup>149</sup> McMahan posits that the property or capacity of note is self-awareness.<sup>150</sup> Jaworska posits the capacity to care.<sup>151</sup> But the reader will see that each of these attempts is subject to obvious counterexamples—instances of a being with worth and rights that lacks the named capacity.

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<sup>144</sup> Wolterstorff, *Rights and Wrongs*, 350.

<sup>145</sup> "For the intellect that God made overflow unto man and that is the latter's ultimate perfection, was that which *Adam* had been provided with before he disobeyed. It was because of this that it was said of him that that he was created *in the image of God and in His likeness*. It was likewise on account of it that he was addressed by God and given commandments, as it says: *And the Lord God commanded, and so on* (*Guide*, I, 2)." See Maimonides, "Guide," 24.

<sup>146</sup> Tooley, "Abortion and Infanticide."

<sup>147</sup> Feinberg, "Abortion."

<sup>148</sup> Quinn, "Abortion."

<sup>149</sup> Singer, *Practical Ethics*.

<sup>150</sup> McMahan, *Ethics of Killing*.

<sup>151</sup> Jaworska, "Full Moral Standing."

Thus Wolterstorff's motivation to create an alternative account—his position that the worth that accounts for our human rights is a bestowed worth, a worth had in virtue of God's love for God's creatures:<sup>152</sup>

What we need, for a theistic grounding of natural human rights, is some worth-imparting relation of human beings to God that does not in any way involve a reference to human capacities. I will argue that being loved by God is such a relation; being loved by God gives a human being great worth. And if God loves equally and permanently each and every creature who bears the *imago Dei*, then the relational property of being loved by God is what we have been looking for. Bearing that property gives to each human being who bears it the worth in which natural human rights inhere.<sup>153</sup>

For the one who feels the worth bestowed on God's creatures by God's desire for relationship with them is unsatisfyingly contingent, consider these various theological commitments the theist could smuggle into an account like Wolterstorff's: were there a God, one should conceive of God's love for God's creatures not as contingent or arbitrary, but rather as necessary, in virtue of the necessity and essentiality of God's benevolence. That is, one need not be bothered by the hypothetical, "What if God wakes up one morning and no longer desires to be in relationship with God's creatures? Would it then follow that God's creatures would no longer be of sufficient worth for grounding inherent human rights?" It may well be a feature of God's benevolence that because God is *essentially* benevolent, and because God's love is

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<sup>152</sup> Wolterstorff insists that relics, pieces of art, ambassadors, and friends all have properties such that worth is *bestowed* to them, and the best analogy Wolterstorff comes up with for our worth-bestowing relation to God is that of the worth bestowed in *friendship to a ruler*. That we are *beloved* by God is a worth-bestowing relational property that accounts for the suite of inherent human rights that concerns us most, our friendship with God presumably giving rise to a new status and new claims of ours to certain treatment (p. 360). More on this analogy to friendship-with-the-Queen later; it remains to be seen if it is a good analogy.

<sup>153</sup> Wolterstorff, *Rights and Wrongs*, 352. Here, Wolterstorff explicitly uses language that indicates that, in his view, rights *inhere* in worth, rather than supervening on worth. Nothing important hinges on this disagreement, but I have claimed that rights *supervene* on worth. I prefer speaking in terms of the supervenience relation, because the *inherence* of any entity in another is opaque and, in my opinion, explanatorily unhelpful. But it is important to note that the supervenience of entity *A* on entity *B* does not necessarily preclude the inherence of entity *A* in entity *B*. I emphasize the supervenience relation, because in my view moral facts are higher-level facts than the facts on which they supervene, but both sets of facts obtain concurrently, and the more fundamental facts are in some important sense *responsible* for the moral facts. In my view it is accurate to say that "humans have the worth they have in virtue of more fundamental facts about them," and the supervenience relation better illustrates that *in virtue of* accounting.

everlasting,<sup>154</sup> that God simply cannot but desire relationship with God's creatures, assuming such a relationship is a life-good for things like us. This appeal to God's essential goodness is, of course, in answer to the puzzle of how to ground rights, when all of the candidate properties or capacities that have traditionally been taken to ground rights ultimately fail to bear out under inspection (as when counterexamples are offered of rights-holders who lack the critical property or capacity). Under this view, God is such that our status as beloved is immutable. Grounding or basing the rights in something noncontingent—i.e., in the worth we have in virtue of the relation we stand in to God *due to God's essential benevolence*—certainly makes that which grounds rights immune to counterexamples. It makes the relevant worth not an essential fact about us, but rather a necessary one. The non-theist, though, remains free to reply, "Yeah, all of that is interesting, but I'm not convinced because I'm just not convinced that there's a God."

So, to summarize and conclude: according to Wolterstorff, the property on which the relevant worth supervenes is that relevant relational property of God's relation to God's creatures. Justice is grounded on respect for worth and the claims it generates to objectivized-by-God life-goods. In a just state of affairs, everybody gets that to which they have morally legitimate claim and nobody is treated in a way that demeans them (that is, nobody's worth is disrespected). Human rights are *claim-rights* against one's moral interlocutors and they are the normatively binding social relations one stands in to others—claimant, claim, and moral interlocutor. We enter into others' presence with our *worth* and so also with these claims against others to their respect, to certain treatment, goods, provision, or care.<sup>155</sup>

### C. Against Wolterstorff's Theistic Account of Human Worth

Here I will spend some time criticizing Wolterstorff's attempt to base or ground inherent human rights in the worth that individuals have, not in virtue of some capacity or alienable

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<sup>154</sup> Jeremiah 31:3; see also note 110.

<sup>155</sup> A question might arise here: do we, then, have no rights when not socially situated? The proper Wolterstorffian answer to this question, I think, is that we are never non-socially situated, that our rights are the claims we make against others *in social contexts* (i.e., in all contexts).

property of theirs, but rather in virtue of God's desire for relationship with them. I take this explicitly theistic element in his account to be, by far, the weakest point in Wolterstorff's theory of justice. This is nowhere explicit in Wolterstorff, but plausibly it is the conjunction of:

- i. *God desires relationship with everybody, and*
- ii. *God's desire for relationship with each particular human is a feature of God's essential moral goodness, that entails*
- iii. *Every human has a tremendous worth that is bestowed on them by God in virtue of their being beloved by God, or in virtue of their standing in the right relation to God, as a feature of his essential moral goodness.*

And presumably it is the necessity of one's status as *beloved by God* or *rightly related to God*, in virtue of the essentiality of God's benevolence, that supplies the inalienability of the worth it is in virtue of which one has inherent human rights. Wolterstorff *does* hold that at least some of our rights (our human person-rights, the rights we have in virtue of the different roles or statuses we occupy, contract rights, etc.) are accounted for in such a way that does not require appeal to theological assumptions, but again, Wolterstorff is dissatisfied by attempts to ground *inherent human rights* secularly (or even theologically, if the grounding is to be in the capacities that constitute the *imago Dei*). These other grounding attempts appeal to human properties and capacities that are alienable from a person and it is critical that our inherent human rights and that which grounds them be conceived of as inalienable to us.

For a moment, let us be theists. And let us be critical of Wolterstorff's theistic attempt to account for rights not on the grounds that he is a theist and the reader is not, but rather on the grounds that his theistic attempt to account for rights is problematic in its own right even granting Wolterstorff's own theism. My first of two objections to Wolterstorff's theistic attempt is that its appeal to relational properties that the rights-holder has *vis-à-vis* God seems too contrived by half. I do not mean that it is an altogether unprincipled, unthoughtful effort; I mean, rather, that in removing from humans the source of their own worth, and in outsourcing the

source of their worth to *God* and *God's desire for friendship with things like us* and *our relation to God*, we are left with something counter-intuitive and awkward.<sup>156</sup> Wolterstorff's accounting for rights in the relation of God to the rights-holder seems more responsive to the need for a theory that can establish the inalienability of inherent human rights than it is responsive to the tremendous worth that humans have *in their own right*. It is too contrived by half because what we are after is an account of human worth and it is bizarre to claim that the worth of the rights-holder ultimately has very little to do with the rights-holder herself but rather very much to do with God.

Wolterstorff likens the worth and status that are bestowed onto an individual to whom God stands in the right relation to the worth and status that are bestowed onto an individual in virtue of their being a friend of the Queen.<sup>157</sup> I take it that his monarch analogy is supposed to be theologically substantive. Certainly, there is something to the intuition that underlies this analogy—the person who is a friend of the Queen seems, in some sense, *elevated*. But surely such an elevation is merely cultural or social. Wolterstorff posits that it is plausible that being befriended by the Queen bestows on an individual a good deal of worth, new grounds for respect, and, therefore, rights. However, while being a friend of the Queen does confer to one certain new rights (say, the right to go inside Buckingham Palace, or the right not to be arrested upon approaching the Queen), I think it implausible to say that friendship with the Queen bestows on one any real *worth*. This special relation to the Queen confers rights, but not inherent human rights, not the sort that supervenes on human worth. Friendship with the Queen, rather, grants to one a set of conventional claims that must be respected in virtue of what it means that one enjoys the Queen's friendship.

The rights that come from friendship with the Queen, then, should not be conceived of as grounded in some worth enjoyed by an individual in virtue of that relational property

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<sup>156</sup> This awkwardness is one mark against the grounding story Wolterstorff tells. Shortly, I offer a more pointed objection—that his account is not internally consistent at bottom.

<sup>157</sup> Wolterstorff, *Rights and Wrongs*, 360.

“friendship to the Queen,” as we would conceive of that individual’s *actual* inherent human rights. Rather, the rights that come with friendship with the Queen are *conferred*. This is a problem for Wolterstorff, who needs *friendship with God* to bestow worth-enhancing properties and thus bases in us for our inherent human rights, rather than to merely *confer* a new set of rights in virtue of one’s relation to God. What Wolterstorff requires here is an account of how any *relation to another* could bestow worth in the relevant way (via the bestowal of some property on which worth supervenes) and thus give rise to inherent human rights.

I argue that friendship with the Queen cannot bestow on one worth, not because the Queen has the wrong kind of value or is insufficiently valuable, but rather because *relation to any other* is not the sort of property that can alter one’s worth or moral status in the desired way. Right relation to the Queen—or any other—does not *get at* one’s human moral considerability. All other things being equal, one enters the presence of the Queen, prior to one’s friendship with the Queen, with the full force of one’s moral considerability, yet lacking certain conferred rights that can be had only in virtue of friendship with the Queen; friendship with the Queen and desirability to the Queen grant to one new claims and liberties, but not new *objective human worth*. Again, this is not because the Queen is not actually uniquely valuable in virtue of her status as the Queen; it is because *relation to another* just is not the sort of thing that adds to or subtracts from one’s worth. Our relations to others are external to us—they are highly contingent social or even spatial facts independent of that set of properties we have on which our human worth supervenes.<sup>158</sup> Indeed, imagine if one’s personal worth were at the mercy of one’s social relations—if it were at the mercy of the Queen’s, or any other’s, daily mood! Would getting blocked by the Queen on Facebook, for instance, *actually* decrease one’s moral

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<sup>158</sup> To Wolterstorff’s credit, the morally relevant relation to God would *not* be a highly contingent social fact. It would be a necessary fact, due to God’s essential benevolence.

considerability and eliminate some of one's grounds for respect and, consequently, one's inherent rights?<sup>159</sup> Surely not.

None of this is to challenge Wolterstorff's assumption that inherent human rights, grounds for respect, and worth are all conceptually tied together. Instead, I take it to challenge just Wolterstorff's claim that relational properties can be worth-bestowing properties, and thus ultimately responsible for inherent rights. It still stands that relational properties can be (at least sometimes) rights-conferring properties, whether by contract or convention. At issue, though, is whether relational properties (even relation to God!) can sensibly be thought of as accounting for the worth that is ultimately responsible for inherent human rights, and I hold that they should not be thought of in that way.

Wolterstorff intends friendship-with-the-Queen to be an illustrative analogy, but it only serves to spotlight the problem with Wolterstorff's attempt to account for inherent human rights in the worth we gain in virtue of the relevant relation to God. If it is true that relation to another (or desirability to another) is not the sort of thing that can bestow worth-generating properties on us, then it is false that relation to God (or desirability to God) is the sort of thing that can be considered a worth-generating property for us, barring some principled and morally relevant distinction between *friendship with another* and *friendship with God*.<sup>160</sup> And that the desire God has for friendship with us is essential to God's nature would be no such principled and morally

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<sup>159</sup> Consider a relation that is an accomplishment, e.g., a person who saves the Queen from some threat. Such a relation would be more reasonably considered the sort of property that could generate some bit of worth, as compared to other relations. However, not only could the savior of the Queen fall out of the graces of the Queen at some later date (one could imagine a sneaky thief who saves the Queen to get in her good graces only to later use their new station to steal the Crown Jewels!), but they could also have failed to save the Queen in the first place. In principle, some such relations are plausible candidates for serving as bases for worth, even though they are relations; however, the highly contingent nature of these relations, accomplishments or not, is a concern. What's needed ultimately is an account of ineradicable worth, and these highly contingent and alterable relations do not lend themselves to securing human worth's ineradicability.

<sup>160</sup> Indeed, perhaps there is a crucial disanalogy between friendship with God and relationship with the Queen. But my position is not that relation-to-a-queen and relation-to-God are or are not analogous; my position is that any relation to another whatsoever is not the sort of thing that can account for human worth. Wolterstorff argues that that is precisely what bestows on us the relevant worth, so my claim is that he is mistaken. His view, I take it, is ultimately that it is facts about God, and not facts about us, that gives us the relevant worth, and I find *that* to be unacceptable.

relevant distinction; that is a fact about God, not of us. The problem with conceiving of a relation to another as the source of the worth that inheres in us in virtue of which we have our inherent rights is not merely that these relations are usually highly contingent—it is that these relations *do not bestow human worth*. Just as it is appropriate to hold that right relation to the Queen confers certain rights, though, we should certainly allow that right relation to God might confer certain rights. Indeed, such a rights-conferral is an important Christian theological commitment.<sup>161</sup> Just as was the case with the Queen, God is surely uniquely valuable, and any relation to God that we have is an interesting fact about us that probably confers certain rights to us, but it is misguided to conceive of that relation to God as being that which bestows *human worth* on us. And if all of that holds up—if relationships can confer rights but not bestow worth—then Wolterstorff is wrong that it is on our various relational properties to God that our tremendous worth supervenes, in virtue of which we have our inherent human rights. And if it is false that it is in virtue of our relation to God that we have the relevant worth, then we ought to find a different source for that worth. My view: instead of appealing to relational properties to God in an attempt to objectify and fix human worth, the theist should just hold that God created rights-holders and they *really are objectively valuable* (independent both of what God has to say about them and of their relation to God) for some other reason.<sup>162</sup>

My second objection to Wolterstorff's grounding account is that in explaining *why* we are such that we are candidates for the requisite friendship with God, Wolterstorff must ultimately make appeal to the alienable properties and capacities that he begins with rejecting. Let me explain. Accepting, *à la* Wolterstorff, that God loves human beings and desires relationship with us, we should probably also accept that God loves other sorts of things (and desires relationship with them, too, if they are the sort of thing capable of being in a relationship). But in Wolterstorff's account, humans, uniquely, are

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<sup>161</sup> I am talking here of the rights of "sonship" as discussed by New Testament authors, as in Galatians 3–4 and Romans 8.

<sup>162</sup> I defend this view in Chapter 3.



bestowed by this love with the worth it is in virtue of which we have our inherent human rights. So, it follows that there is something *different* about us from other sorts of things, or there is something different about God's love for us from God's love for other sorts of things, such that we are bestowed with the worth it is in virtue of which we have inherent human rights and other things are not. Under Wolterstorff's account, in order to account for why we have inherent human rights and other things that are loved by God do *not*, it seems that what is needed is one of two things:

1. a principled way to distinguish between God's *different kinds of love for different things*, such that the kind of love God has for us bestows the human worth we have in virtue of which we have inherent human rights and the other kinds of love he has for other things do not, or
2. a principled way to distinguish between the kinds of things that are from those that are not the proper candidates for the kind of relation to God that Wolterstorff posits is the source of the worth sufficient for one's being a human rights-holder.

If we have (1), then we are able to say that God loves different things in different ways and it is in virtue of the unique kind of love with which God loves humans that humans get to have special inherent human rights-conducive worth. But then we should ask why God loves some things (humans) in a human rights-bestowing way and other things (not-humans) in ways that do not bestow human rights (or, perhaps, any kind of right)—and for a non-arbitrary answer, we shall have to appeal to properties and capacities that are unique but alienable to humans. If we have (2), then we are able to talk about God's relationship with, say, dogs as being of one kind, and his relationship with human persons as being of another kind, in virtue of dogs being the kinds of things they are and in virtue of humans being the kind of things we are—but in this, too, we shall also ultimately have to refer to properties and capacities that are characteristically human but alienable. If we have neither (1) nor (2), then we have no principled way of determining why humans are *special*, such that we get inherent human rights and non-humans

do not, and we have no way of reserving the rights we take to be uniquely human (inherent human rights) exclusively for beings who are human.

In our account of inherent human rights, we need to be able to say why humans have inherent human rights and other kinds of things do not, and we need to be able to appeal to facts about humans that are inalienable, else the account will fall to the objections facing any account of personhood or moral considerability that grounds an individual's personhood or moral considerability in properties or capacities that can be lacked. That either (1) or (2) is required to get Wolterstorff's broader story off the ground is a problem for Wolterstorff, because both (1) and (2) must ultimately make appeal to properties and capacities that a rights-holder could lack in order to set the human rights-holder apart from things that are not human rights-holders. And central to Wolterstorff's work is the attempt to characterize inherent human rights as inalienable—the worth it is in virtue of which a human has his or her rights has to be conceived of as inalienable and a human's candidacy for worth-bestowing relationship with God in the first place has to be conceived of as inalienable or else the whole thing tumbles like a house of cards when one of the traditional counterexamples is offered.

Presumably, Wolterstorff would embrace (2) and say something like: *God's desire to be in relationship with a person bestows on that person a worth or status that can only be had by humans, and certainly not by things like labrador retrievers, and thus humans are special; it is only humans who can have that special moral status, because only humans are the kind of thing with the properties necessary for being in the requisite relationship to God.* Wolterstorff could go with (1) and claim that God has different kinds of love reserved for different kinds of creatures, but that would be an unnecessarily complicated picture of God's love for all the different kinds of God's creatures there are. Instead, in Wolterstorff's framework it is more fitting to think of God's love for humans as being human worth- and human rights-bestowing, and his love for other things as *not* being human worth- and human rights-bestowing, because humans are a *special candidate for friendship with God.* But it really does not matter, as both (1) and (2) ultimately

reduce the moral uniqueness of humans to properties or capacities held by humans that can only be conceived of as alienable. Both (1) and (2) run aground on that old problem of counterexamples.

Indeed, Wolterstorff claims that humans are uniquely candidates for friendship with God.<sup>163</sup> But we should ask what it is in virtue of which humans are special candidates for friendship with God and labrador retrievers are not. Would not Wolterstorff answer that question by appealing to some property or capacity of humans that makes them uniquely human and precludes things like labradors from being humans? Personhood, say, or rationality or a sense of morality. These are all likely candidates, but the problem is that Wolterstorff has already rejected that it is some property or capacity in virtue of which humans have the special status they have—for the only properties and capacities on offer to explain why humans are humans and non-humans are not are properties that could be lacked by a person. Wolterstorff needs an account of the special moral status of humans, or of the special candidacy that humans have for friendship with God, that does not appeal to alienable properties and capacities, or else he has simply pushed his original problem back a level: he landed on *friendship with God* as that property of humans in virtue of which we have the worth we have, because that relation is inalienable from us in virtue of God's essential goodness—but this all assumes that the necessary conditions of candidacy for friendship with God *are themselves inalienable*. And it is not at all clear that something like *personhood*, or *whatever capacity it is in virtue of which one can be a friend of God's*, or *whatever property it is in virtue of which one is beloved by God*, is inalienable. And if that property or capacity in virtue of which we have our special status (as candidates for relationship with God) is *not* inalienable, then Wolterstorff has not solved his own problem, and his account fails to meet his own standards.

What are the necessary conditions for candidacy for friendship with God, if not just a complex of properties and capacities that could be lacked? And if the problem in the first place

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<sup>163</sup> Wolterstorff, *Justice in Love*, 156.

with grounding inherent human rights in capacities or properties was that we will inevitably be presented with an individual (say, an infant or a comatose patient) who lacks the property or capacity necessary for being of sufficient rights-conducive worth but whom we would still regard as an inherent human rights-holder, then any claim that Wolterstorff makes about the property or capacity it is in virtue of which *humans* are the proper subjects of friendship with God but *dogs* are not is troublesome, because the only properties or capacities on offer are alienable. If that alienable property or capacity would not do for grounding inherent human rights in the first place, then it will not do for demarking those kinds of things which *are* from those which *are not* fit to be the proper recipients of the bestowal of the worth it is in virtue of which humans have their inherent human rights. If it is *false* that the property or capacity it is in virtue of which humans are the proper subjects of relationship with God and other things are not is alienable—that is, if it is in fact the case that every human has that property or capacity—then Wolterstorff could have just tied the worth requisite for giving rise to inherent human rights to *that* property or capacity. But he rejected properties and capacities altogether, because the relevant ones could all conceivably be lacked by an inherent human rights-holder. Wolterstorff's account demands a starting point, but we have not yet arrived at one.

Without a principled way to distinguish things like humans from things like labrador retrievers in the sense relevant to *candidate for relationship or friendship with God*, it seems we have only two options: either God only *arbitrarily* embraces friendship with humans (but not other things) in such a way that the worth sufficient for inherent human rights is bestowed on humans but not other things (an arbitrariness that would be unacceptable to most theists) or else God desires friendship with labradors and humans both and there is nothing in principle special about humans such that we are qualified for friendship with God and dogs are not, so dogs should be thought of as having the same rights we do in virtue of the worth bestowed on them by God's desire for relationship with them. The problems with both alternatives should be apparent to the reader. I am far from denying that labradors have rights—in fact, I think

labradors *do* have inherent dog (or animal) rights. It is just that it is an implication of Wolterstorff's grounding story that if there is no property or capacity in virtue of which *every* human is non-arbitrarily set apart from things like labradors as a proper subject of friendship with God, then either labradors should be conceived of as having inherent human rights in virtue of their God-bestowed worth or God's morally special desire for friendship with humans is arbitrary. But if there *is* a property or capacity in virtue of which humans are set apart from things like labradors as the proper subjects of friendship with God, then that property or capacity better be inalienable or else a single counter-example of a rights-holder who lacks the capacity or property requisite for friendship with God will sink the whole framework. And if there is such a property, one should simply ask: why not simply put *that* property at the foundation of an account of inherent human rights, rather than appealing to relational properties like the relation to God that Wolterstorff posits?<sup>164</sup>

I have demonstrated two fundamental issues with Wolterstorff's account of human worth. First, it is peculiar to account for *human worth* by appeal to facts about God and humans' relation to God—we should want, in an account of inherent human worth, an account that points to certain facts about *humans*. I argued that relational properties are not adequate *grounds for respect*, in the sense that relational properties should not be thought to “bestow” worth the way Wolterstorff posits they do. And second, at bottom, Wolterstorff's account fails his own standards. In accounting for why humans are special, *vis-à-vis* our candidacy for friendship with God, we have only recourse to properties, traits, or capacities that could be lacked by a rights-holder. In search for a property or set of properties that could account for human worth, Wolterstorff rejects human properties and capacities that could be lacked by a human rights-holder because he needs inherent rights to be inalienable; if these same properties or capacities

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<sup>164</sup> Wolterstorff might well answer: “Because I *really do* think it is relation to God that bestows human worth on rights-holders. I was not merely looking for a terminus. I think there is something special and morally relevant about that relation to God whether or not the necessary conditions of candidacy for friendship with God are alienable, and when it comes to accounting for human worth the property alone that accounts for candidacy for friendship with God does not cut it.”

remain at the bottom of his account as I have demonstrated they do (those properties or capacities that are constitutive of capacity for that worth-bestowing friendship with God), then we do not yet have an account of the inalienability of the special moral status of humans. At best, we would be left with an account of the special moral considerability of humans that is subject to counterexamples—examples of rights-holders who lack the properties requisite for friendship with God. And that would not do. On both of those counts, Wolterstorff's picture does not adequately account for human worth; his account of human worth is both counterintuitive and internally inconsistent. In the next chapter, I offer theistic and secularized alternatives to Wolterstorff's account of human worth that will enable us to keep the broader Wolterstorffian framework intact—they do not appeal to relations, and they do not appeal to properties that can be lacked by a particular presumptive human rights-holder.

### Chapter 3: Some Wolterstorffian Alternatives

#### A. Some Alternative Theistic Foundations

In the next section, I will offer a menu of options, re-renderings of Wolterstorff's account of why humans are morally considerable such that they have the full suite of inherent human rights—they will be, at bottom, secularized accounts of human worth. But first I want to offer a couple theistic alternatives to the theistic relational property that Wolterstorff posits as that which is responsible for humans' inalienable worth. First, let's jettison the friend-to-a-ruler understanding of this relational property and adopt instead a more traditional understanding of the human-to-God relation: that of *the relation between parent and child*.<sup>165</sup> What does this parent-child relation get us, as against that friend-to-a-ruler relation? It gets us a relation that is more plausibly constituted by a set of properties that can be conceived of as *belonging to the rights-holder*, a set of properties that resists both accusations of arbitrariness and accusations of alienability or contingency. So, here, the relevant worth-inhering property becomes that of "child of God," or that set of properties that constitute that relation "child of God" (whichever locution suits your preferences). The parent-child relation is not a merely spatial, social, or highly contingent relational property, something alienable from those who currently stand in the relation. In the natural world, that relation of parent to child is a relation that is constituted by various essential properties that are natural; one has the parents one has as a matter of essential causal fact and counterfactually one would be some other individual had one different parents.<sup>166</sup> That is, there are immutable facts about me more fundamental than the various merely social or spatial relational facts about me, such that I am the son of John and Becky Howard and such that they are my biological parents. In addition to those immutable facts about me, I stand in social and spatial relations to my parents that are much like the friend-to-a-ruler relations that Wolterstorff leans on. But in the ruler story, there are no deeper or metaphysically

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<sup>165</sup> As found in Galatians 3:26 and 2 Corinthians 6:18.

<sup>166</sup> Kripke, *Naming and Necessity*.

significant properties associated with that relation to speak of, as there are in the parent-child relation. I suggest that Wolterstorff's theistic account of human worth should be reconceived in terms of that parent-child relation and those immutable properties that the parent-child relation lends to both parent and child.

So, a theologically and metaphysically significant parent-child relation of God to humanity would feature immutable properties of both God and individual humans. But would that relation of God (parent) to humans (children) account for human worth in a way that Wolterstorff's friend-to-a-ruler relation could not? I offer three stress-tests according to which the parent-to-child understanding of God's relation to rights-holders is superior to the friend-of-a-ruler understanding of God's relation to rights-holders:

Test 1: Under which understanding of God's relation to God's human creatures does God's special love for humans escape accusations of arbitrariness on God's part?

Test 2: Under which understanding of God's relation to God's human creatures can the property on which human worth supervenes be conceived of as a truly ineradicable or essential feature of the rights-holder?

Test 3: Which understanding of God's relation to God's human creatures most plausibly allows that relation of God-to-rights-holders to serve as a supervenience base for the incredible worth associated with inherent human rights?

Regarding (1), under the view according to which God's special relation to humans is understood in terms of a parent-to-child relation, God's special regard for humans would not be characterizable as arbitrary. Parents can understand this talk of God's love for humans in the context of their parent-to-child relations—when pressed, no parent would claim their love for their child is *arbitrary*. But in denying that a parent's love for his child is arbitrary, I am not claiming that God loves God's children *for a particular reason*; quite the opposite, I am claiming



that parents neither love their children arbitrarily *nor for reasons*. Just as it would be strange to insist that parents love their children arbitrarily, it would be strange to say that parents love their children for *reasons*—there might be natural *explanations* for the *agape* love that parents have for their children, but it is not as if parents weigh their children's properties and characteristics in deciding if and how much to love them. There may well be natural duties to treat their child in the ways constitutive of their child being appropriately loved, but it is not as if parents employ some rational calculus in determining how much to love their kid or in determining whether or not their kid is an appropriate object of their parent-love. We could even conceive of the love that a parent has for their child as being a constituent part of parents' relation to their children; in some sense, biological or otherwise, the love a parent has for their child is *caused* or *entailed* by that relation. That parent-love is neither arbitrary nor the product of reasoned consideration of the beloved, and it does not appeal to any properties whatsoever of the beloved, much less to those properties or capacities of the child that could be lacked. So in the arbitrariness stress test imposed by (1), the parent-child relation seems superior to the friend-of-God relation. The friend-of-God relation has to answer accusations of arbitrariness along the lines of *Why are humans candidates for this critical relation to God and other things are not?* and the parent-to-child relation of God to rights holders presumably does not—God has parent-love for those things to which God is, as a matter of fact, related as parent.

Regarding (2), under the view that the better understanding of God's relation to rights-holders is that of parent to child, that property or set of properties "child of God" would be properly conceived of as ineradicable. The rights-holder's status as God's "child" would be an essential fact about the rights-holder, an unalterable standing or relation to God. One might wonder what, exactly, we mean in saying that humans are the children of God and thus that our "child-hood" is an essential fact about us—we know what we mean when we say that Bobby is the son of John and Becky, and that Bobby's sonship to John and Becky is an immutable biological property (and kin relation) of Bobby's. In saying such a thing, we appeal to natural

facts about biology and kinship. But in the relation of God to humans, there are no such biological facts to appeal to (though there very well may be facts of kinship to appeal to). The theist, here, would be tasked with choosing his own specification of what exactly it means that God and rights-holders stand in the parent-to-child relation to one another. If I am to claim that God is my father, I will need to specify in what sense, exactly, God is my father, if not in the biological sense; the theist, here, will need to develop commitments regarding this relation specific to his favored variety of theism. I take it that all such commitments will appeal to beliefs about God's being the cause, sustainer, or ground of the rights-holder—if not biologically, then certainly causally, ontologically, or spiritually—in addition to God's parental love for rights-holders. The theist might appeal to humans being of a particular *kind* of thing, in virtue of their proceeding from God, being caused by God, being in the relevant relation to God, or bearing God's *image*;<sup>167</sup> assuming that the general parent-child relation is essential, and assuming that these facts about us associated with that parent-child relation of God to rights-holders would also be essential, we could reasonably argue that the worth that supervenes on those properties of ours is inalienable.

Regarding (3), I see no issue with conceiving of that property or set of properties that constitute the parent-to-child relation of God-to-rights-holders as being that property or set of properties on which the relevant human worth supervenes. Were we to take the parent-child relation seriously regarding our relation to *God*, that would lend to humanity a significant degree of something much like *divinity* or *royalty*. It would make us, in some respects at least, the same *kind of thing* as God, at least in the very narrow sense that we are whatever sort of thing one must be in order to be God's children, that we share some bare minimum of similarity or identity in kind. Presumably God is immensely valuable, and it seems true that our close relatedness to God (both in kind and in "kin" relation) could amount to a property or set of properties on which

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<sup>167</sup> The theistic dualist may have an easy answer to this set of questions: the dualist could posit that the nonphysical mind or soul is an appropriate ground for respect.

considerable worth supervenes. Indeed, for some reason or another, God himself or herself is taken to be immensely valuable. In this view, we would be valuable in virtue of our relation to God not because we share properties and capacities of God that are eradicable from us, but rather because this essential relation entails certain essential facts about us (a property or set of properties that is ineradicable from us that is entailed by this kin- or kind-relation to God) sufficient for our having the relevant human worth.

And emphasizing this further, here, is important: On this view, a rights-holder is not to be conceived of as valuable because God loves them just as a parent should love their child, but rather because God is related to them precisely as a parent is related to her child. Under this view, it is not God's love for God's children that confers worth or properties on which worth supervenes; rather it is the metaphysically substantive *parent-to-child relation itself* (or the property or set of properties that constitute that relation) on which the relevant worth supervenes. The rights-holder would have whatever properties are constitutive of their standing in the parent-to-child relation to God, and great worth should be thought to supervene on *those* properties. This parent-to-child relation is relevantly different from the friend-of-God relation in two major respects: the parent-to-child relation depends on properties that are essential to both the parent and the child (while the friend-of-God relation does not), and the parent-to-child relation between God and rights-holders is plausibly comprised of a property, kind, or kinship relation on which human worth could more plausibly supervene. If one wants a theistic foundation in one's account of human worth, I would recommend this refiguring of Wolterstorff's theistic foundation.

A different theistic foundation that is worth considering is an appeal to God's unfailing love for God's human creatures. Under at least some traditional theistic views God's love is presented as everlasting and unchanging.<sup>168</sup> We can conceive of God's love as being an essential property of God's with regard to us, much in terms of God being omnibenevolent

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<sup>168</sup> Jeremiah 31:3, see also note 110.

toward us. So, that we are loved by God, under this view, is a necessary and ineradicable fact. If what is desired is a way to account for our human worth in a way that makes our human worth ineradicable from us, this is one way forward. I prefer the previous accounting for our human worth, however, for this reason: in appealing to facts about God (for example, God's essential benevolence) in order to explain why we are valuable, we fall short. A view that appeals to facts about me, in order to explain my worth, seems clearly preferable. That I am beloved by God is a sort of relational or tangential fact about me, but if what accounts for the fact that I am beloved by God is the essential property of God's benevolence and not some relevant fact about me, then it seems we are stuck pointing to facts about God. In principle, there is nothing wrong with that; but we should prefer accounting for our own worth by appeal to our own properties or status. Above, I posited that some sort of shared kind or kin relation to God could well account for human worth; under that view, the relevant kind or kin relation would not be some exclusive fact about God, but rather some fact shared in common by us and God—some fact or property or status that both God and humans participate in.

Abraham Heschel provides a noteworthy discourse on the *imago Dei* that could be incorporated into either of the above theistic alternatives. In Heschel, we see the moral significance of humans embedded in humans' firm likeness to God:

Man is man not because of what he has in common with the earth, but because of what he has in common with God. The Greek thinkers sought to understand man as a part of the universe: the prophets sought to understand man as a partner of God... It is a concern and a task that man has in common with God... The intention is not to identify "the image and likeness" with a particular quality or attribute of man, such as reason, speech, power, or skill. It does not refer to something which in later systems was called "the best in man," "the divine spark," "the eternal spirit," or "the immortal element" in man. It is the whole man and every man who was made in the image and likeness of God. It is both body and soul, sage and fool, saint and sinner, man in his joy and in his grief, in his righteousness and wickedness. The image is not in man; it is man.<sup>169</sup>

Here we see a radical identity of *the image of God* and *humanity*—a rejection of the appeal to the traditionally offered properties and capacities to explain the *imago Dei*, and a reference to

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<sup>169</sup> Heschel, "Sacred Image," 152.

the “concern and task” that man has in common with God. This identity imbues every human with worth and makes them a “world” in their own right. We are to love God because God is inestimably precious and we are to love people for the very same reason. Heschel’s view is intrinsically theistic and it defies Wolterstorff’s characterization of *imago Dei* accounts of human worth as mistakenly appealing to capacities and properties that can be lacked. Heschel, here, offers to the theist a way to conceive of the inalienable worth of humans that is immune to the traditional counterexamples. One might ask: *Why should sharing a particular “concern and task” make one inestimably precious? Does likeness to God, whether we are appealing to traditional capacities or properties or to Heschel’s identity of the imago Dei with humanity, sufficiently account for the worth and rights we are discussing?* But were one to accept that the *imago Dei* would suitably account for human worth, Heschel’s particular *imago Dei* account would provide the theist with an *imago Dei* account of human worth that does not run aground on the counterexamples (image bearers who lack the necessary property or capacity) Wolterstorff used to dismiss *imago Dei* accounts in the first place.

## B. Some Secular Foundations

In the Chapter Two, we saw that even granting Wolterstorff’s theistic metaphysical commitments, his theory still struggles, at bottom, to find a place to start that is not ultimately just an appeal to alienable (or merely contingent) human properties or capacities. I just offered some alternative theistic foundations, and I will leave it to the reader who insists on a theistic foundation to choose their preference. Now, though, I will offer some secularized foundations to Wolterstorff’s account and I hope to show that a workable secularization of Wolterstorff’s work provides a suitable foundation for a compelling theory of justice that is reducible to talk of human worth and morally legitimate claims, *sans* reference to God. In his search for a foundation for human worth and inherent human rights, Wolterstorff argues that there is no human capacity on offer that can satisfactorily serve as that ground—any of the capacities on offer (like human consciousness, or the human capacity for reason, or the human moral sense,

etc.) could conceivably be missing from a human we all would take to be a legitimate member of the moral community (like an infant, or a comatose patient).<sup>170</sup> But if the property that obtains in humans such that humans are of a value sufficient for accounting for human rights is not some capacity, then what is it?

In seeking an answer to this question, it is tempting to appeal directly to Wolterstorff's account, like this: *What is the property of being such that God desires friendship with us? Whatever that property is, any secularized version of Wolterstorff should just highlight and emphasize that property.* But that question is misled.<sup>171</sup> In Wolterstorff's account, it is not *the property of being such that God desires friendship with us* that bestows on us tremendous worth and new grounds for commanding respect; rather, what does the work in Wolterstorff's account is the relational property that obtains between rights-holders and God, and it is on *that* relational property that tremendous amounts of worth supervene, sufficient for the generation of the full suite of human rights. And the question above is misled because, clearly, that relational property between God and the rights-holder cannot be *secularized*—any account of a divine being's love for rights-holders or their relatedness to rights-holders will be necessarily non-secular. So the task of secularizing Wolterstorff's account cannot be the task of secularizing the relation of God to creature. Rather, the task is to find a fact about human beings distinct from said necessarily theistic relation that could possibly account for human worth and the full suite of human rights.

In originally searching for such a candidate fact about humans, I went so far as to entertain some sort of counterfactual property, something like: *were there* a God just like Wolterstorff's God, that being would desire friendship with us or would stand in the requisite

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<sup>170</sup> Wolterstorff's discussion of those various accounts and various kinds of accounts can be found in Chapter Two. Wolterstorff tidily observes that any characteristically human capacity that has been offered, or that could conceivably be offered, as that which accounts for human worth could conceivably be lacked by a rights-holder.

<sup>171</sup> I should say, there is a sense in which that question is *not* misled. Even were one a committed atheist, one could use a line of questioning similar to this one to ask and answer questions surrounding human rights-holders and their worth by reference to some sort of ideal observer, a perfect being, and an idealized relation between that perfect being and human rights-holders. I bypass that here, though, because it is not necessary.

relation to us, and it is in virtue of our being such that that counterfactual God *would* love us (or *would* stand in the requisite relation to us) that we have the worth and human rights we have. But, again, it was never a feature of Wolterstorff's account that what accounts for our human rights is our being any such way—what accounts for our human rights, according to Wolterstorff, is a standing relation to God. And for reasons I will not belabor, a merely counterfactual relation to God is insufficient as an account of our worth and normatively binding social relations in the actual world. In a Wolterstorffian framework, it is simply *false* that both:

- a. what it is in virtue of which we have the worth that we have is that, independent of God's love for us, we have some such valuable property or status, *X*, and that
- b. God loves us, *because* we are such that we have that property or status, *X*.

To Wolterstorff, inherent human rights-conducive worth is bestowed by the relevant relation to God and attempting to think of human worth in terms of our being the particular way that makes us proper candidates for God's love for us (whether there is a God or not) simply misunderstands the Wolterstorffian theory's commitments. Such an understanding of Wolterstorff's work would also run aground on objections to capacities accounts that were addressed in the previous chapter.

So the question remains: in this secular account, what fact about humans—some property or capacity or relation or status—could possibly account for the worth and rights that every human has? A secularized account necessarily removes God from the picture, and we are left, then, with only *normal* properties and relations to choose from. The problem here is the aforementioned one: all the remaining and traditionally candidate properties, capacities, and relations are properties, capacities, and relations that could fail to obtain in any number of humans (and human persons, if one opts into Wolterstorff's distinction between humans and human persons),<sup>172</sup> the intuition remaining notwithstanding that these humans who lack the

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<sup>172</sup> Some humans aren't human persons, under this view. Some humans lack the properties and capacities necessary for human personhood. I agree there is a distinction between persons and non-

property on offer are clearly rights-holders. We simply ought not to harm the comatose, for instance, or the very young, whether or not they have the property, relation, or capacity of distinction.

Needed here is a Rawlsian maneuver, because what follows in the candidate secularized accounts will be unacceptably dogmatic to some. The Rawlsian maneuver: we have general and overwhelming overlapping consensus that human beings (whatever, exactly, *they* are) are inestimably precious and that their moral considerability and moral status accrue to them in the form of a variety of rights (whatever, exactly, *those* are). The matters of controversy, as covered, are *What exactly are the necessary and sufficient conditions for 'humans?'* and *Why exactly is every human relevantly morally special?* and *What exactly are human rights and what accounts for them?* In seeking answers to those questions, the philosophical community splits in countless directions into heated debate.

There are, of course, thinkers who deny that there are rights, or who interrogate the general project of the rights theorist. Alasdair MacIntyre holds that rights are “fictions,” simply on grounds that believing they are real does not make them real and that no existing account of rights satisfies him.<sup>173</sup> Douglas Husak rejects that there are rights, because there is nothing shared in common by all humans that could explain why all humans share some rights.<sup>174</sup> Elizabeth Wolgast questions the notion of rights from the perspective that they (at least sometimes) unhelpfully turn rights-holders into moral agents that are combative, atomistic, and undermining of a pro-social interrelation of agents.<sup>175</sup>

But, a broader overlapping consensus remains: human beings are inestimably precious and their moral considerability and moral status accrue to them in the form of a variety of rights. In answering why, exactly, those things are the case, we are presented with a plethora of views

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persons, but in the case of non-person humans and humans who are also persons, I take the distinction to be a non-morally relevant distinction when it comes to inherent human rights.

<sup>173</sup> MacIntyre, *After Virtue*.

<sup>174</sup> Husak, “No Human Rights.”

<sup>175</sup> Wolgast, “Wrong Rights.”



and arguments that are far less supported than those objects of overlapping consensus. I am intensely interested in the subject of what accounts for humanity, for human moral considerability, and for rights, so I will continue to offer candidate accounts for those entities. But I grant that none of the candidate accounts will enjoy the measure of overlapping consensus as is enjoyed by the claim: human beings are inestimably precious and their moral considerability and moral status accrue to them in the form of a variety of rights. It would be unwise to offer starting points that are less supported (and less supportable) than that claim, so I offer, instead, that what follows will be a menu of options that I take it are workable secular accounts of the moral significance of humans. That human beings are inestimably precious and that their moral considerability and moral status accrue to them in the form of a variety of rights enjoys overlapping consensus, so let us grant that *that* is the case and use it as a starting point. Debate and controversy will occur under the surface of that starting point in search for accounts of *why*, but with this Rawlsian appeal to consensus regarding the moral significance of human beings we can move into the more applied portions of my paper, if none of the following proves to be sufficiently convincing to the reader.

I just mentioned that the following secularized accounts will be unacceptably dogmatic to some readers, but I maintain that they will be no more dogmatic than many of our other moral or value intuitions, or the core claims of competing theories. So here is the first attempt: what accounts for our human worth ought not to be conceived of as some eradicable property or relational property of humans on which our rights-producing worth supervenes. Rather, I propose that the property we are looking for is the essential property *humanity*, or our essential substance *humanity*, or the essential status *human*.<sup>176</sup> Human worth, in this view, supervenes

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<sup>176</sup> Feinberg and Dworkin both posit that belonging to the human species is sufficient for the possession of full moral status; see Feinberg, *Bounds of Liberty* and Dworkin, *Life's Dominion*. I agree with them that membership to the human species is sufficient for human moral status, but the appeal directly to species and the biological facts associated with species opens cans of worms associated with how species may change over time, mutated genes, etc. I do not think we need to get so fine-grained as facts about human

on that fundamental and essential human property or status, *humanity*. What is this essential status or property, *humanity*? Here, my claim is simply that the status *human* or the property *humanity* (whichever locution you prefer) is a fundamental and essential property that inheres in every human being.<sup>177</sup> *Humanity* (conceived of as a property or status) cannot be analyzed in more fundamental terms and it is to be conceived of as a property separate from the suite of other properties and capacities that humans may have, lack, or possess to varying degrees. *Humanity* is an essential fundamental property or status, and it is on *it* that human worth supervenes. These accounts demand one terminus or another, or else there is no answer to the question, “What is it about every human being such that every human being has ineradicable worth and inherent human rights?”; one way forward is to claim that the morally relevant properties go no further down than that fundamental property or status of ours, *humanity*. There

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DNA to be able to identify or characterize humanity, and I insist that it should be facts about an individual that account for that individuals' worth, and not facts about the broader species that individual belongs to.

And this view differs from theirs in a more important respect: In accounting for human worth and the rights that supervene on that worth, I am not seeking an account of some objective, trans-species moral standard of full moral status. I do not tie full moral status to human moral considerability. I am seeking only an explanation of human moral considerability. I think it is likely that if any entity has full moral status, humans do. However, I am not working within a framework that is committed to placing humankind at some apex of moral considerability. Of course, I hold human beings to be immensely valuable and worthy of rigorous moral consideration. However, I am not opposed to the great moral considerability of any non-human (animal or being) that fits the bill. I am committed, though, to humans possessing a unique *human moral considerability* and to the uniqueness (to humans) of the supervenience of human rights on human worth. I am happy to ascribe to any entity, being, species, or person that qualifies whatever measure of regard is afforded by full moral status; I think it likely that humans are as morally considerable as any other thing, but I am not, in principle, opposed to some view that could sensibly hold some other being or kind in an even higher regard than we hold humans.

My project is more modest than what the accusations of “speciesism!” and “anthropocentrism!” would have the reader think—I seek only an explanation of why humans have normatively forceful human rights and why non-humans do not. I am not seeking to provide grounds for thinking humans, or only a certain subset of humans, are at some moral apex, and I certainly am not seeking to provide grounds for thinking that we are the sole occupants of that moral apex. What other grounds are there for a non-human object's, being's, or person's possessing a worth on which rights supervene? Certain morally relevant properties, surely, like rationality or consciousness—but each being that possesses these properties could potentially lose these properties or could potentially have lacked them. As with humans, it may also be that Martians, for instance, possess a measure of worth that supervenes on their Martianhood, that property conceived of as a brute, fundamental fact had in common by every Martian. And if Martians are to be conceived of as having inalienable Martian rights, for instance, some such property would be needed.

<sup>177</sup> Under this view, this property or status needs to be conceived of as essential to every human, or else some human rights-holders could be found that lack the property. And under this view, this property or status needs to be conceived of as fundamental, so that the reductive project can be given a terminus. Otherwise, the property or status on offer could potentially be reduced to lower-level properties that could be lacked or that seem morally irrelevant (say, the possession of a particular DNA strand).

is something in virtue of which every human is ineradicably human—that property or status, *humanity*—and it is on *it* that our human worth supervenes.<sup>178</sup>

When we abstract away from the candidate capacities and properties typically on offer in considerations of human personhood or personal value, human beings and their tremendous worth remain. The comatose patient, the infant, the severely developmentally disabled, the fully functioning human adult—these human individuals are located at different places on a range of human capacity and productivity and personality, but they are each unequivocally human beings. And it is on the fact of their humanity, and not on some other alienable or non-essential property, that the tremendous human worth sufficient for human rights supervenes.<sup>179</sup> The alternative—that some humans have inherent human rights and others do not have inherent human rights, because some humans lack the property or capacity of relevant moral significance—simply flies in the face of our most pressing and forceful moral and justice-related intuitions.<sup>180</sup> I agree with Wolterstorff that the track record of the philosophical community in locating that property or capacity in virtue of which tremendous value accrues to *every human being* is pretty dismal, so here I appeal, instead, to the fundamental property or status,

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<sup>178</sup> We and other beings have a plethora of other worth-conferring properties: rationality, agency, the ability to make value judgements, the capacity to care, consciousness, the various capacities associated with personhood, etc. But none of these is what it is to be essentially *human*, and the human worth on which human rights supervenes should not be thought to supervene on any of these various other properties.

<sup>179</sup> I will mention here a view that I considered but ultimately decided against: that human rights-holders are humans (i.e., they have that property *the fact of our humanity*) and that every human also has as an essential property this human worth that is unique to humans. I am not opposed in principle to this view—it simply eliminates the supervenience of human worth on *humanity*. Rather than saying “worth supervenes on humanity” we would be left to say “humans are both essentially human and essentially valuable” or “humans have worth essentially.”

When I say “worth supervenes on humanity” I certainly am also saying “humans have worth essentially.” Holding that worth supervenes on humanity stipulates an important modal relation between the former and the latter, but it does not eliminate that we have worth as a property. Under my view, it is still accurate to say of humans “Humans have the property of unique ineradicable worth.” I just add the supervenience relation, because it seems true that we have the value we have *because of* the more fundamental fact about us, our *humanity*. I prefer a structure in which our humanity (a natural fact about us) is *responsible* for our human worth (a value fact about us), that the properties *humanity* and *human worth* aren’t merely held in conjunction; the supervenience of human worth on essential humanity conveys that notion most clearly.

<sup>180</sup> The pressing intuition: that if anything has these rights, *this particular human on offer* does, whether or not they have the property you so value.

*humanity*. Barring a groundbreaking resolution of the traditional reductive problem, this fundamental *humanity* is a sufficient starting point.

One may contend that I need to offer an account for why I take it humans are *humans* in the sense specified above but things like chairs and trees are not. Why, that is, do things like chairs and trees not have human worth? I am satisfied by the answer: chairs and trees clearly do *not* have the property *humanity*. No fully functioning, good-faith actor would insist that they do; fully functioning, good-faith actors *would* be able to point to instances of *humanity*, however.<sup>181</sup> The more relevant problem for this account, though, would be that of determining (for instance) whether or not *embryos* or *fetuses* have that property, *humanity*. It is clear that embryos and fetuses lack certain of the properties and capacities traditionally on offer (properties and capacities like consciousness, rationality, future-orientation, etc.) and it is clear that embryos and fetuses lack many of the properties and capacities typically taken to be constitutive of personhood. Here, I concede that I have not offered an explanation of this essential property *humanity* that makes it clear or settled whether or not *embryos* or *fetuses* have this essential property. On principle that it is unclear how the fundamental, ineradicable property or status *humanity* is something that could be *obtained* by an embryo or fetus, I take it that they *do* possess *humanity* and that the immensely ethically complicated space of the abortion debate will necessarily be a consideration of moral contexts in which *prima facie* there is a conflict between two rights-holders' rights but in which (in *that* moral context) *ultima facie* only one of those rights obtains and the other does not. Here, I have made no claims about the *personhood* of embryos or fetuses; rather, I have indicated that I would accept a view in which a

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<sup>181</sup> Levinas's ethics-first philosophy is worth mentioning here; see Levinas, *Totality and Infinity*. In encountering another person, we experience them as such (and our responsibilities to them) precognitively. Knowledge of others and whatever ethical truths obtain of them is "meta-physical" and gained in the experience of the other. This ethics-first philosophy or ethics-first epistemology is worth mentioning, because it terminates or precludes traditional reductive problems. *What is a human?* and *Why are humans valuable?* and *What are rights and why do we have them?* would all have answers obtained precognitively in Levinas's view. Needless to say, Levinas's ethics-first philosophy is disruptive to the way this subject matter and debates over it are conventionally structured.

human embryo or a human fetus has that essential property or status, *humanity*—a property that *that* organism could not possibly lack.

A second way to figure this *fact of humanity* is in terms of a human family. This is similar to positing belonging to the human species or the possession of some fundamental biological essence as that which constitutes the property *humanity*, but the concepts used are less exacting. Under this view, what accounts for a human individual's special moral considerability is not a particular property or capacity of theirs (or set thereof), but rather their membership in the human family, a sort of kind or kin relation. Take me: I am a Howard. That is an immutable fact about me. Imagine I were hit very hard in the head and lost the capacity for rational thought or consciousness or empathy or what have you. I would still be a member of the Howard family, yet I would now lack any given characteristically human property. What makes me a Howard is not some eradicable property or capacity, but rather the metaphysically relevant connection to the rest of the Howards. And were I to lack the relevant characteristically human property or capacity, the rest of the Howards would still insist on my rights—there is still a right and wrong way to treat me, indeed even were I dead, not in virtue of some alienable property or capacity of mine, but rather in virtue of my standing as a Howard.

So in this *human family* view, one would appeal to humanity as a sort of essential kin relation that can save the moral considerability of beings who lack some alienable characteristically human property or capacity. Wolterstorff takes aim at eradicable properties and capacities like consciousness, capacities for reason and thought, the capacity to care or be future oriented—counterexamples of the sort offered by Wolterstorff to the eradicable properties and capacities views are harder to come by for this kind of *human family* view. With humanity at large conceived of as a family, and with individual humans conceived of as participating in membership in the human family essentially, it is hard to imagine what could alter the status of a particular human, such that they would cease exhibiting membership in the human family. This sort of view more solidly resists the sort of counterexamples offered by Wolterstorff against the

capacities accounts of humanity. But, note: appealing to a human family in this way does not account for *why* individual members of the human family have worth because it does not provide an obvious explanation of what makes the human family, in general, morally special. It is only potentially an account of why, if it is already accepted that humanity and humans in general are valuable, *one particular human who lacks some eradicable and characteristically human property or capacity still ought to be considered morally considerable*. They are morally considerable *qua* human, whether or not they possess some relevant and eradicable characteristically human property or capacity, because of their membership in the human family.

### C. Against Speciesism and Anthropocentrism

An aside to address potential accusations of speciesism and anthropocentrism: It does not follow from *my position that humans are of a unique moral considerability* (that human rights supervene on human worth and that human worth supervenes on the irreducible and fundamental property, humanity) that *humans are of paramount moral considerability*. I take it that the right of every being with rights—human or not—should be prioritized. In all of the various moral contexts in which inalienable human rights obtain, they obtain inalienably, as do the inalienable rights of non-human beings. In these moral contexts in which rights obtain, to violate a right is gravely wrong, no matter of what sort the being is whose rights are violated. I have focused on states of affairs in which the worth and rights of humans are in question, because in this work I am most interested in human rights. I have used the term “justice” as such, as applied to the domain of the respect or disrespect for the worth of *humans*. But nowhere have I claimed that questions of justice and injustice (questions of whether or not the rights that obtain in a given state of affairs are being respected) cannot be applied globally or take as their purview the worth and rights of nonhuman rights-holders. The wronged animal or Martian or ecosystem—we should evaluate these instances of injustice, too, in the same way

that we evaluate disrespect for human worth.<sup>182</sup> I have simply kept my scope narrowed to the domain of the worth and rights of humans. We should handle the cases when a human's right conflicts with a dog's right, for instance, or the cases when a human's right conflicts with a demi-god's right, just as we handle those cases where it appears that the rights of two humans conflict: *à la* Mill, when presented with cases of apparently conflicting rights, we should offer, instead, that *in that particular moral context there is no such conflict of rights*. No right is being trumped by another right or superseding principle; one of the rights obtains and the other does not *in that particular moral context*; so what appeared to be a conflict of two rights is really no such conflict, and we are not led into a troubling prioritization of countermanding rights. Every violation of a right, no matter the kind of right it is, is *wrong* and instantiates *injustice*.

Puzzling questions, here, arise. For example: is it just as wrong, then, to violate a dog's right to not be tortured (without warrant) as it is to violate a human's right to not be tortured (without warrant)? Before I answer this question, let us agree that the wrongness of an action should not be conflated with the disgust, offense, or outrage that an action causes—though, these are natural reactions to moral wrongness, and I think various magnitudes of disgust or outrage probably *do* generally track with well-examined moral judgments.<sup>183</sup> I hold that the worth of a human *qua* humanity and the worth of a dog *qua* dog are incommensurable. They are simply different kinds of worth, and the two quantities of worth cannot be weighed directly against one another using the same scale of value; so, there is no ranking of species strictly in terms of *worth*, although shortly I will point out that there are ways to *compare* different sorts of organisms objectively, and some of those grounds of comparison should be considered morally relevant. Above, I argued that the worth on which a right supervenes also accounts for the normative force of a right. It follows from that commitment, along with this commitment to the incommensurability of the various sorts of worth that there are, that it will be complicated to

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<sup>182</sup> I am being permissive here with my suggested applications, and perhaps overly so, on purpose.

<sup>183</sup> Of course, there are plenty of examples from history when disgust and outrage did *not* appropriately track with wrongness and rightness.

compare the *wrongness* of the violations of two rights, the supervenience bases of which are of two incommensurable kinds.

I certainly do not think there are different kinds of *wrongness*, when it comes to evaluating the violation of different kinds of rights—that is, I do not think it is *dog-wrong* to violate the dog's right not to be tortured and that it is *human-wrong* to violate the human's right not to be tortured. I take it there is only one kind of *wrongness*, and only one kind of *injustice*, when it comes to the violation of normatively binding social relations—such violations are simply *wrong* and *unjust*, as determined by whether or not the worth in question was respected. So, given that and this worth-incommensurability, if there is a principled ranking to be had of the wrongness of a violation of some human right and the violation of some dog right, such a principled ranking would have to appeal to some other difference than that of a difference in degrees of two incommensurable worths or kinds. *But if it is possible to rank violations of rights had by humans and rights had by dogs, what accounts for that ranking, if the underlying supervenience bases are incommensurable?* I agree with the commonsense view that says torturing a human, for instance, should come with a harsher punishment than does torturing, say, a dog; now I owe you a principled way to hold to that, the kicker being that it needs to survive accusations of arbitrary speciesism and anthropocentrism.

On what grounds do I believe that torturing humans warrants harsher punishment than torturing dogs, if not on grounds that humans are *more valuable* than dogs (a claim that would entail a value-commensurability that I have already rejected)? I have indicated my commitment to the worth of the human *qua* humanity and the worth of the dog *qua* dog being of two incommensurable kinds, so I believe it is literally false that humans *qua* human are *more valuable* than dogs are *qua* dog. But humans and dogs are certainly commensurable along *other* dimensions—as in, evaluating the ability of each to feel pain, express care, have futures of worth, mental capacity, be future-oriented and rational, consciousness, etc., and whatever worth supervenes on those various properties. I take it worth supervenes on those various properties



of each different kind of being in a way that *is* commensurable. That is, there is not *human rationality* and *dog rationality*—there's just the one capacity, rationality, that different beings of different kinds have to different degrees. Worth supervenes on that property, rationality, to different extents in different individuals, in accordance with the extent to which that being is capable of exercising the capacity, and then rights supervene on those various degrees of worth.

So, I believe that we cannot compare dog-worth and human-worth, but we *can* compare the extent to which a human being and a dog have certain other morally relevant capacities and properties, like rationality or capacity for pain and pleasure. So, there *are* dimensions of the moral considerability of dogs and humans that *can* be compared, and fairly without controversy, to whatever extent that dogs and humans have moral considerability that supervene on properties and capacities that can be had by both dogs and humans. The violations of the rights that supervene on those properties, properties had by both kinds of beings, *are* comparable, and we can generally sensibly say that violating the human's right is worse than violating the dog's right, not on grounds that dogs *qua* dog are less morally important than humans *qua* humanity, but rather on grounds that the very same underlying morally relevant properties are had to objectively different degrees. So, we can see how we might go about comparing injustices committed against dogs and injustices committed against humans, and how one might go about saying that violating a human's right is *worse* than violating a dog's right in a way that is immune to accusations of speciesism and anthropocentrism. There are properties shared in common, but had to different degrees, that make for non-arbitrary metrics.

But, of course, what is left to account for is the incommensurable human worth and dog worth that will obtain, and the violations of rights that supervene on just those incommensurable moral entities (worth), and how those violations can (or cannot) be ranked. How do we conceive of the difference in two violations of two individuals' rights, when those rights supervene on bits of worth that are different in kind, if we cannot measure the underlying worth on the same

scale? I first considered this answer: *Violations of the rights that supervene on the worth that supervenes on an individual's essential humanity and violations of the rights that supervene on the worth that supervenes on an individual's essential dog-hood cannot be weighed against one another, full stop; this follows from the fact that a right's supervenience base (the worth) accounts for the normative force of the claim issued. The supervenience bases are incommensurable, therefore the violation of two rights that supervene on two different bits of incommensurable worth cannot be evaluated in the same terms.* But I think that line of thought is fallacious. It does not follow from the incommensurability of human worth and dog worth that the violation of an inalienable human right that supervenes on human worth and the violation of an inalienable dog right that supervenes on dog worth *cannot be compared full stop*. That each is an instantiation of injustice gives us, I think, grounds for saying that *both are wrong and in the very same sense*. But given the worth-incommensurability, we have no obvious conceptual resources for ranking those two particular wrongs, aside from any ranking made possible by any worth that may supervene on *other* properties that are shared in common by the two different-in-kind beings.

So here is where we stand: it is clearly *worse* to violate certain rights had by humans than it is to violate certain rights had by dogs (those rights which supervene on worth that supervenes on capacities had in common by dogs and humans but to different degrees) and potentially vice versa, on grounds that those rights are accounted for by properties that are commensurable across kinds; in these cases, it is easy for us to see that one of the two different sorts of entities has more moral considerability than the other along that single objective dimension of evaluation. But when it comes to comparing the injustice of violating inalienable human and inalienable dog rights, isolated from any properties than *can* be objectively measured against one another across-species—what then? In demonstrating that it does not follow from the incommensurability of dog worth and human worth that violations of the two different sorts of rights cannot be compared full stop, I indicated that the violations of inalienable

human rights and inalienable dog rights are in fact commensurable along at least one dimension—that of their both being instances of either justice or injustice. Violations of both entities' rights is unjust, *full stop*, regardless of whether there can be a further ranking of the wrongness or the injustice. I leave open the question of whether we can rank violations of rights that supervene on inalienable human worth and violations of rights that supervene on inalienable dog worth—both violations are wrong and unjust, but I see no conceptual resources for a more illuminating analysis than that, aside from any analyses we could conduct of the properties and capacities shared in common by the beings in question.

We feel the need to be able to rank those violations of rights, and I offer that *that* felt need arises from the need to be able to discern which right trumps the other when it seems two specific rights conflict; I have made the case that there are no such conflicts, and that when there appears to be such a conflict one is merely misperceiving—in a moral context in which it appears two rights conflict, one of the rights obtains in that moral context and the other does not. The open question—*What to do with incommensurable dog- and human-worth and the rights that supervene on those entities exclusively?*—loses some urgency when we unravel the underlying needs to rank rights and discern which of two countermanding rights trumps the other. I will leave the question *What to do with incommensurable dog-worth and human-worth and the rights that supervene on those entities exclusively?* with this: in the real world, there can never be a consideration of two morally significant individuals of any kind that does not take into account some property or other apart from the worth the individuals have *qua* that individual. The abstraction away from all the properties that can be objectively compared from species to species (properties like rationality, capacity for pleasure or pain, future-orientation, etc.) is theoretically interesting but cannot find an application in the real world. It is not a dodge, then, to say, in response to the question *What to do with incommensurable dog- and human-worth and the rights that supervene on those entities exclusively?*, that: incommensurable dog- and human-worth and the rights that supervene on those entities are *never* the whole story in *any*

moral context; rather, morally significant beings like humans and dogs step into any moral calculus in their entirety with no morally significant and commensurable property abstracted away.

There is an important difference of levels to emphasize: incommensurable worth at the more fundamental level with its one standard of evaluation (amount and kind of worth) and the rights that supervene on that worth at a higher level with a wholly different standard of evaluation (whether or not, and to what degree, the underlying worth of whichever kind was disrespected). I prefer the commonsense position, that violating an inalienable human right (like, not being tortured without warrant) is *worse than* violating an inalienable dog right (like, not being tortured without warrant), on grounds that there will be objective standards for cashing out the *worseness* of the violation of the human's right. Both violations are horrendously wrong. One can accept dog-worth and human-worth incommensurability while also accepting that torturing humans is *worse* than torturing dogs because of other commensurable factors. And we *can* compare humans and dogs objectively along those other dimensions—their properties and their capacities, and the extent to which they have those properties and capacities.

And these other properties and capacities, and the extent to which they are had, certainly provide us a metric for comparing two things that are incommensurable at some other dimension of analysis (that of their worth). To wit, violations of the rights of dogs and the rights of humans are both wrong; human worth and dog worth are incommensurable; dogs and humans possess certain morally relevant properties and capacities to different extents, according to which the violation of one being's right can be adjudged in a principled way to be morally worse than the violation of the other's right; but this ability to compare the gravity of violations of rights does not entail that there will ever be a true conflict of two different rights—when it appears there is such a conflict, in the moral context under consideration one of the rights obtains and the other does not, so we will never need to determine which right comes to the table with greater urgency for the sake of determining which right trumps the other.

In my view, *humanity* serves not as a unique grounds for full moral considerability *writ large*, but rather as the unique grounds for *human* moral considerability. I accept that other properties like reason, rationality, the capacity to care, and the capacity to make evaluative judgements serve as further grounds for a moral considerability that can be had by any human or non-human entity that has those capacities; and I accept that rudimentary cognitive capacities serve as further grounds for moral considerability that can be had by any human or nonhuman entity that has those capacities; and I accept that a potentially very valuable future can be further grounds for a measure of human or nonhuman moral considerability; and human or nonhuman beings both might have some other property or capacity, like foresight or the capacity to plan and reason, that makes treating them in violation of *that* capacity wrong. Here, I am rejecting that identity of human moral considerability with full moral considerability. Instead of full moral status, *simpliciter*, there are varying kinds of moral status—*human* moral status, *Martian* moral status, *robot mind* moral status, *person* moral status that different kinds of things will have to varying degrees, *rational being* moral status that different kinds of things will have to varying degrees, *dog* moral status, etc.

So, I do not claim that humans sit at the apex of moral considerability. On the contrary, I claim that in the most fundamental respects humans and other beings are morally incommensurable—this, a refutation of any accusation that I have claimed in some unprincipled way that humans are more valuable or more morally considerable than non-humans. To further undercut such an assumption, I happily grant: to the extent that the moral considerability of humans *can* be compared to the moral considerability of non-humans (as in, comparing the capacities or properties had in common between humans and non-humans), there are potentially *very many beings* that are of far greater moral considerability than humans. There will be some respects in which humans and the beings that are *more morally considerable than humans* are incommensurable (in particular, regarding the worth each being has *qua* the kind of thing it is)—but there will be many respects in which, say, a demi-god is of greater moral

considerability. A demi-god could be far more rational, have a far greater capacity for pain or pleasure, have a far greater future-orientation or capacity for rationality, etc. That a particular human is objectively more rational or compassionate or future-oriented than a particular dog, and that that serves as grounds for thinking it is more wrong to torture that human than it is to torture that dog (for example), is hardly the claim that humans sit at an apex of moral consideration. If such capacities are morally relevant, as it is reasonable to think they are, then such capacities serve as objective grounds for comparing at least some of the dimensions of the moral considerability of two beings; but other dimensions will be incommensurable. And I have granted that some non-humans, be it the demi-god or the highly evolved Martian, could have greater moral considerability than even humans do (along those dimensions of analysis that are commensurable).

#### D. Moral Non-naturalism

I hold the view that moral facts are non-natural facts that are neither identical with nor reducible to underlying physical facts. Non-natural moral facts supervene on physical facts, like *humanity* or *consciousness* or what have you, so moral facts are not non-natural in the sense that moral facts are wholly autonomous from the domain of the physical sciences—they are unanalyzable in the terms of the physical sciences, but a covariance relation between the natural and the non-natural obtains. I have indicated an important relation between non-natural human worth, for instance, and the fundamentally natural *humanity* on which it supervenes.

Natural properties are generally conceived of as those properties that fall into the domain of the natural sciences.<sup>184</sup> As far as non-naturalism goes, Shaver is an exemplar of the

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<sup>184</sup> See Moore, *Principia Ethica*. Though, this presumes a general agreement that does not obtain among philosophers about that which is the proper subject matter of the natural sciences. We have presumed a hard line between natural and non-natural facts, for instance. But why think that because physics has nothing to say about moral facts, moral facts are *not natural*? The line is definitional. Might we have just assumed that physics has its act together and can, right here and now, responsibly discuss all that is physical; that physics cannot discuss the moral; and that, therefore, the moral is not natural? We probably have merely assumed that, for better or worse. One may insist, rather, that moral facts are natural facts that our sciences and epistemologies do not yet know how to discuss, and that moral psychology

view that moral terms cannot be analyzed in physical terms.<sup>185</sup> Pigden holds that moral properties are irreducible *sui generis* entities.<sup>186</sup> My moral non-naturalism is a realist's view that holds moral properties to be objective and knowable and I take moral properties to be irreducible to natural properties. My non-naturalism is also a rejection of the claim that natural properties and the concepts we use to talk about them, exclusively, can account for normativity and entities like worth and rights.<sup>187</sup> Moore's paradigmatic moral non-naturalism was primarily concerned with the notion *goodness* and the various evaluative judgments concerned with goodness and badness.<sup>188</sup> I am not so concerned with notions of goodness and badness and evaluative judgments regarding the like, as much as I am concerned with characterizing human worth (and other kinds of worth, too, like the worth that supervenes on the various non-essential properties humans have and on the essential and non-essential properties of non-humans). I hold worth, then, to be a non-natural property that supervenes on certain natural facts; the rights and claims that supervene on worth, too, are non-natural properties.

The obvious problem with any version of moral non-naturalism will be an epistemological one—at the end of the day, is moral non-naturalism just moral intuitionism, with all of its epistemological worries, or can it be something more epistemologically respectable than moral intuitionism? The assumption that underlies this worry is that moral naturalism and moral non-naturalism are on significantly different epistemic footings, the former being more justified than the latter when it comes to the beliefs we form about the moral entities under consideration. But that assumption is not undisputable. Let's begin with the general worries, and in exploring them we will find the assumption that moral naturalism enjoys a surer epistemic footing than does

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somehow traces something objective out in the world. I'm happy to endorse a metaphysically deeper claim that, in principle, physics has nothing to say moral facts, while also accepting the claim that moral facts are objective and knowable facts, though not physical.

<sup>185</sup> Shaver, "Sidgwick's Minimal Meta-ethics."

<sup>186</sup> Pigden, "Naturalism."

<sup>187</sup> I reject Mackie's error theory in which moral concepts refer to non-natural entities and in which non-natural moral concepts refer to *nothing real*; cf. Mackie, *Ethics*.

<sup>188</sup> Moore, *Principia Ethica*.

moral non-naturalism to be problematic. The general worries: if moral properties like worth are non-natural properties, impenetrable to the natural sciences, how do we learn about them, and what are our criteria for forming justified beliefs about them, and when should we take ourselves to *know* things about them?

I have posited that non-natural moral properties invariably supervene on fundamental (or not) natural properties, so my view is somewhat insulated from accusations that non-naturalism only works if we posit some spooky faculty of intuition in virtue of which we are capable of recognizing moral facts. On the contrary, granting that properties like worth invariably supervene on *humanity* in particular moral contexts, we need only start with the capacity to perceive that property, *humanity*, and some capacity (learned or innate) to recognize the moral considerability that supervenes on it from context to context. In this sense, my view is no more vulnerable to charges of explanatory impotence than the view of the moral naturalist who holds that moral properties are identical with or reduce to underlying natural properties—whether a naturalist or a non-naturalist, if morality is at all connected to that property *humanity*, the recognition of moral considerability will be found in conjunction with the recognition of that property *humanity* (or whichever natural property one is examining). The naturalist and the non-naturalist both have to answer the question: once one has recognized the relevant natural property, whether the moral property reduces to (or *just is*) that natural property or whether it stands irreducibly and separate from that natural property, how then does one recognize *the moral property in question*? In the case of that naturalist, there is a further question—why posit moral facts at all if they ultimately *just are* or *are exhaustively accounted for by* the underlying natural facts? Both the naturalist and the non-naturalist faces an epistemological problem here, regarding the beliefs we form and the judgments we make about moral facts. It does not help the naturalist out of this problem to claim that the moral facts *just are* the natural facts, because that reduction does not explain why we make moral judgements above and beyond the natural



facts we can perceive and its appeal to natural facts from top to bottom does not account for normativity or oughtness.

I hold that non-natural moral facts are real and objective and that we learn about them much as we learn about anything else: by learning and by association. Things like us inarguably have capacities for moral psychology and moral judgments, to various extents, and we learn to associate certain moral facts with certain natural facts.<sup>189</sup> I have posited a theoretical framework of the supervenience of non-natural moral facts on natural facts like humanity, but I do not claim that one should be able to *perceive* the supervenience of human worth on *humanity*. I am not bothered by our inability to perceive this supervenience relation, because there are all sorts of physical facts that supervene on other physical facts, the supervenience relation between which we cannot readily perceive—relations of natural facts to other natural facts that we are incapable of perceiving and that are mysterious to us, but that we are committed to due to their explanatory usefulness. If the accusation against my account is that the relation between non-natural moral facts and certain natural facts cannot be *observed*, then my account here falls prey to an accusation that should be levered at any thoroughgoing account of anything, at its bottom: *Your various fundamental entities and your various unanalyzable concepts and the relations that obtain between them all can neither be observed nor explained in finer-grained, more helpful terms—so I think the fundamental entities you posit are not real*. But every account, when examined all the way to its starting point, needs to eventually buck reduction, conceptual analysis, and further inquiry; and, like I have said, there are plenty of supervenience relations that cannot be *observed*, like the relation of mental states to brain states.

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<sup>189</sup> In question in any discussion of moral psychology is whether the deliverances of our moral psychology are judgments about chimaeras, or if they're judgments about real entities out in the world. That we have moral perceptions and make moral judgments is at least some reason to believe there may be real, objective moral entities; that there is broad moral disagreement is hardly an overriding reason to believe that our moral intuitions are always wrong or that they chase fictions. I am a moral realist, and I think we ought to proceed in moral deliberation with both general humility and intellectual humility. Needed, generally, are agreed-upon principles for how to handle moral disagreement. But that falls outside of the scope of this particular work.

All of that leaves important epistemic worries standing: what are our criteria for forming justified beliefs about non-natural moral facts, and when should we take ourselves to *know* something about non-natural moral entities? I am going to side-step those two very big questions because I do not take my account to be burdened to answer them; no more so than any other account is burdened to answer them, at least. Any ethical theory, any scientific theory, any religious theory, etc., will be burdened with general epistemological worries about where justification and knowledge start, and I will leave the matter at this: whatever our standards for justification and knowledge are in other domains, those standards should obtain in moral deliberation, even about non-natural moral entities. But intuitionism of most varieties is *vulnerable* to some particular standard objections. For instance: it seems *lucky* that we should have such a faculty at all, it seems like a mighty cosmic coincidence that our moral intuitions would track reliably with causally inert non-natural moral facts,<sup>190</sup> it seems *unlikely* that our concepts could reliably refer to *sui generis* non-natural, causally inert moral entities,<sup>191</sup> and it seems that intuitionism provides us with no firm way to handle conflicting intuitions. The only of these worries that bothers me is the last one, because it is indeed worrying that perhaps the primary way we can gather knowledge about non-natural moral entities is by intuition—what are we to do with conflicting intuitions? There will be more on this problem in Chapter 4.

But the other weaknesses listed for the intuitionist are, again, not unique to intuitionist accounts. It is a mystery in traditional philosophy of mind and philosophy of language that *any of our concepts and language*, not just those which refer to non-natural facts, are *about* truths out in the world. And any capacity that we have, and not just the capacity of moral psychology, is an interesting fact about us the possession of which may seem to the casual observer to be too-convenient by half; but all of our capacities have etiologies to be told, and the same could be said of our moral faculties and the processes through which we deliberate morally. It is another

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<sup>190</sup> Bedke, “Intuitive Non-naturalism.”

<sup>191</sup> Wedgwood, *Nature of Normativity* and Eklund, *Choosing Normative Concepts*.

mystery in the philosophy of mind that our minds would have a world-oriented character, that our mental states would be *hooked onto* the natural world in the relevant way so as to produce true beliefs—that is no different than the mystery noted about the faculty of intuition.

We cannot readily account for the phenomenon that *any of our mental states* should be world-oriented or truth-tracking, so a similar inability to provide an account for how our moral cognition tracks truth should not be a mark against the intuitionist; further, we cannot readily provide an account for how we can have knowledge of causally inert non-natural entities like *numbers* or *formulae* or *laws* or *programs*, so the same inability to provide an account for how we can have knowledge of causally inert non-natural moral entities should not necessarily be counted as a mark against the intuitionist. Intuitionism in particular and non-naturalism in general have been burdened with answering objections from epistemology, psychology, and philosophy of mind that naturalistic accounts struggle to answer, too. So that non-naturalism struggles to answer those questions is not necessarily a mark against non-naturalism. That there is an explanatory gap between physical facts and moral facts when it comes to evaluating normativity and that beliefs about non-natural moral entities like worth and rights are explanatorily helpful when placed into a broader framework, are marks in favor.

#### E. The Fundamental and Ineradicable Property or Status, Humanity

The view that human worth supervenes on the fundamental property or status, *humanity*, is dogmatic, in the sense that there is no answer in terms more fundamental than “humanity” to the question, “Yes, but what is the property or status *humanity*? What is it in virtue of which those who have the property or status *humanity* have that property or status?” I have no necessary and sufficient conditions to offer in answer, deeper than that foundation. All I can do for an answer is to point to humans, and most humans will uncontroversially have that property or capacity. And further, after asserting that it is in virtue of the property *being human* that rights-holders have their tremendous value, we are left asking, “Yes, but what is it in virtue of which everything with the property or status *is a human being* is tremendously non-instrumentally

valuable?" *That is just the way it is!* is not a satisfying answer. Again, the best I can do is to offer up the deliverances of broad intersubjective agreement—according to our moral cognitions, the humans around us are to be characterized in terms of their seeming immeasurable worth, and human worth is all but universally recognized.

And a simple way to cash out that relation of humanity and human worth is in terms of non-natural human value supervening on the essential property humanity. *Humanity* eludes analysis, yet quite uncontroversially obtains; in much the same way, the concept of human personhood has classically eluded analysis, yet human personhood clearly obtains. A pragmatic but explanatorily sweeping way forward is to offer, simply, that the relevant human worth supervenes on that fundamental and unanalyzable feature about us, our essential *humanity*; that non-natural human worth does not obtain of things like trees and chairs is explained by the fact that *humanity* is not a property or status that obtains of things like trees and chairs.

An appeal to a fundamental essential status or property *humanity* is consistent with some other important moral intuitions: I judge people to be very valuable, both people I know and people who, for instance, are currently seeking asylum at our southern border. And it is clearly *false* that the reason these people are valuable, or the reason why I judge these people to be morally considerable, is any one of the characteristically human properties or capacities that has been offered as a candidate for that which makes an individual *human*, or that in which human worth inheres. When asked, *What is it in virtue of which your friend is valuable? What is the source of the El Salvadorian refugee's worth?*—it seems that answers to these questions of the kind "Well, my friend's capacity for reason grounds my duties toward him!" or "The refugee family's consciousness is that in virtue of which I am morally responsible for their care!" are the wrong kind of answer. Certainly, a capacity for reason and human consciousness are valuable and serve as bases for value. But such things surely are far from why my friends possess the relevant inalienable worth, or why the asylum-seeking family should be granted a home among us. Similarly, an appeal to some biological essence like human DNA misses the mark—I know

of nobody whose respect for others' normatively binding claims is understandable in terms of some conviction of theirs regarding the moral considerability associated with human DNA (although, human DNA is miraculously complicated and elegant, and can surely be thought to be sublime in a biological or mechanical sense).<sup>192</sup> Such answers miss the forest for the trees; those answers either posit entities of the wrong sort (entities that are ill-suited for moral considerability) or they appeal to alienable and contingent properties. Rather than appealing to these other various sorts of properties, I contend that our fellow humans are the sort of things that ought to be valued the way we value them (as in, their being *objectively and ineradicably valuable*) precisely because they are the kind of thing they are, human, at the fundamental level; *human worth* supervenes on humanity, and the alternative is ground that is riddled with counterexamples.<sup>193</sup>

If one grants this *humanity* as an essential property or status on which worth supervenes, then the traditional search for the property or capacity (or set thereof) on which our tremendous human worth supervenes can be called off; we need not appeal to some property or capacity (or set thereof) more foundational than the basic fact of our humanity. It is in virtue of nothing more (or less) than *being human* that a person has the worth and inherent rights that he or she has. Dogs, trees, and chairs, of course, lack the property *humanity*, while an infant or comatose patient *has* the property. Computers and Martians lack the property or status *humanity*, etc. This is not to say that dogs and trees and computers and Martians lack worth or rights altogether, rather it is just to account for why these beings and things that lack the

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<sup>192</sup> I am not interested here in answers to the question, "What makes people subjectively valuable to other people?" I am concerned only with the question, "Why do we take others to be objectively valuable in their own right, independent of us and our judgements about them? Where do we locate others' objective worth?"

<sup>193</sup> Remember: if one cannot accept this entity, humanity, that resists analysis—if one cannot accept that humans, in virtue of their essential property or status *humanity*, are basically and irreducibly valuable in such a way that gives rise to the normatively binding social relations they find themselves in to others—one is free to begin one's theory of justice with the widely accepted and relatively uncontroversial view that *humans are valuable for some reason or other and have rights*, and to remain agnostic regarding a precise account of *why* exactly. Either way, one can accept the broader picture: that regardless of why humans have worth, normatively binding claims supervene on that worth, and justice and injustice amount to whether or not those claims are met.

property *being human* also lack *inherent human rights*; these other things, too, have properties that humans do not have, which serve to account for their particular worth and any rights they might have (even rights that, potentially, humans would not have).

I need to defend this formulation of the fundamental, ineradicable fact of our humanity and the worth that supervenes on it from accusations of *arbitrariness*. If we are merely going off of intuitions and moral judgements, the objector might ask, what is to keep someone from arguing that the relevant worth supervenes on some property other than their *humanity*? I need to show how my account does not leave the door open to some other who wants to argue along similar lines for a position most of us would find morally abhorrent: that, for instance, only *men* are basically and ineradicably valuable, such that *men* (and not women, and not those who identify otherwise) have the worth on which inherent human rights depend; or that only *white people* are basically and ineradicably valuable, such that *white people* and none others have the worth on which inherent human rights depend. Or else, above and beyond some baseline of human worth, that *men* are somehow more valuable than *women*, or that *white people* are somehow more valuable than *Black people*, etc. What is to stop the sexist or the racist from arguing, with an argument that has a structure like mine and with appeal to their own (bigoted) intuitions, that only men or white people have the worth that is tantamount to humans' special moral considerability, and why is my starting point (*all humans have the human worth on which human rights supervene*) principled but the sexist's or racist's starting point (*only some humans have special moral considerability*) is not?

Here, I lean into another Rawlsian maneuver. Were this a strictly metaphysical conversation, the bigot would be free to argue from their own foundational commitments to their abhorrent conclusions. But this is not a strictly metaphysical conversation. It is also a political conversation and just as the matter of the moral status of humans and the existence of rights are agreed upon by thinkers from within even radically divergent worldviews, so, too, does the matter of egalitarianism enjoy relative consensus. And though there is a metaphysical

discussion to be had, the widely accepted view and starting point (no matter one's worldview) is that people are to be treated fairly and with equity. The political space within which an overlapping consensus of a variety of worldviews is enjoyed precludes bigotry. And the overlapping consensus is that every *human being* possesses rights.

But let us entertain the metaphysical conversation for a moment: I have offered that human moral considerability supervenes on the property or status of being human, and being a human of thus and such a color or sex or gender or religion or nationality can hardly make a human more or less morally considerable. That assumes, of course, that humanity *really is* the morally salient feature, and, of course, that assumption could be taken to beg the question against the bigot who offers that it is not *humanity* but rather some other property that is at the bottom—a property like sexual orientation, or biological sex, or skin color. So as not to beg the question, let us say this: there are properties, and then there are properties. That is, there are morally salient properties on which worth and moral considerability can reasonably be taken to supervene and there are properties that provide simply no reason for believing they should figure into calculations of human moral considerability (like hair color or height or gender or skin color). The bigot who would argue that some humans do not have the rights that we are interested in accounting for is simply projecting a moral significance that is not there onto metaphysically shallow and morally irrelevant properties like skin color, gender, or religious beliefs. The bigot's "moral judgments" are far likelier to be the outputs of deep-seeded insecurities, simple ignorance, wishful thinking, biases, or whole complexes of false beliefs about the objects of their racial or gender resentment. Given the deliverances of biological anthropology, cognitive science, ethics, theology, history, and truly intersubjective moral discourse, there is reason to think that moral judgments like mine are more informed than moral judgments like the bigot's, and that the bigot's claims are merely attempts to dehumanize some humans.

I am aware that the bigot (or the devil's advocate) could charge: *it is race that is morally significant, humanity is axiologically irrelevant, and it is absurd to carve up moral spaces according to this notion of the fundamental fact of rights-holders' humanity!* But with that, the bigot has to carry burdens that I do not. The bigot would need to explain why some humans do not have human rights, given the overlapping consensus that *humans do have rights*; or else, the bigot would need to argue that certain subsets of humans are somehow subhuman; or else, the bigot would need to reject that there are human rights in the first place. The bigot sets out to deny that some particular humans stand in normatively binding social relations to others. We should place onto the bigot the burden of demonstrating non-arbitrarily why morally insalient properties like race or gender or religious commitments should be conceived of as being that entity which best accounts for one person's rights and disqualifies another from having rights. It may be fair to charge this account with being an analytically unhelpful take on *humanity* and the worth that supervenes on that property, but it is unfair to charge this account with *arbitrariness*—this account is a principled appeal to the universal (to humans) property or status *humanity* and the worth that comes with it, however unanalyzable that property or status may be.

Were the bigot asked *why* humans of thus and such a race, but not humans of some other race, are immensely valuable and superior (and the same for sex or religious commitment or what have you), the bigot could answer: worth is a non-natural property that supervenes on white skin, clearly. To which we should say: skin color is a highly contingent, alienable, and morally insignificant property and the bigot's appeal to skin color is arbitrary and misguided. In addition to failing to explain why every human is inalienably valuable, the bigot's appeal to white skin pigmentation fails to explain why every *white person* is inalienably valuable; after all, skin pigmentation can change, and the notions of whiteness and racial superiority are the contingent outputs of political history, economic exploitation, power struggles. I have started with *Every human has normatively forceful human rights—let's explain why*. The bigot starts with either:



- a. *I and the people like me are human, and these others are subhuman and are, therefore, in a different moral class than us, or*
- b. *we are surely all humans, but humanity is not a morally salient category, and some other property (skin color, cultural norms, religious belief, or an individual's or community's history) had by some humans but lacked by others is the morally salient property.*

The bigot, then, would be left to explain what makes some of us humans and the others subhuman, or what makes some other property than humanity the morally relevant category. The bigot, too, would be tasked with demonstrating why the overlapping political consensus, with its various egalitarian commitments, is wrong.

So, I have offered, with appeal to the fundamental property *humanity*, that every human is valuable; the bigot offers that some humans are valuable and some are not. There is broad intersubjective agreement that *humans* are morally considerable. I have attempted to offer an account of inalienable inherent human rights as supervening on the worth we have due to that ineradicable property of ours—the fact of our humanity. I place the property or status *humanity* at the foundation of rights-holders' moral considerability because it is both an essential fact about us and a property or status that obtains of every human one could point to. And this approach is preferable to Wolterstorff's approach because what makes a rights-holder morally considerable should be conceived of as some fact about the rights-holder, rather than some fact about humans *vis-à-vis* their relation to some other thing (even to God).

In defense of my own account: it is on the bigot to demonstrate why metaphysically shallower traits like sex or gender or skin color or religious tradition should be weighed in looking for the relevant moral considerability; if he argues that those shallow traits are where moral considerability lies, rather than in the rights-holder's humanity, the bigot will need to defend his moral judgments that appeal to (contingent, alienable) properties some humans have and others lack. If the bigot appeals to contingent and alienable properties to justify his bigotry,

then the bigot's view of worth and moral considerability falls to the same sorts of objections (from counterexamples that point to a property's or capacity's alienability) mentioned in previous chapters. Furthermore, to index moral considerability to those shallow features would exclude many humans who are considered by the vast majority of the moral community to be *immensely morally considerable* from being considered legitimately so; these excluded humans are valuable in virtue of their humanity, but also in virtue of the various characteristically human capacities that can be lacked.

I have offered Wolterstorff's account of human worth, critiqued it, and provided alternative understandings of his account of why every human being is valuable and has inalienable human rights. I offered that, if the goal is to account for human worth by appeal to humans' relation to God, the parent-to-child relation between God and humans is a more feasible *relational property* than that of the friend-to-a-ruler relation offered by Wolterstorff. Whether one chooses an intrinsically theistic account of human worth or a secularized account like the one offered here, one will have the resources needed to get core Wolterstorffian claims off the ground: that every human being has an ineradicable worth sufficient for the full suite of inherent human rights, that when these grounds for respect are violated injustice obtains, and that rights-holders are *owed* the life-goods to which they have legitimate claim. I also explored objections to my account on grounds that I am guilty of speciesism and anthropocentrism—that I have elevated human moral considerability in an unprincipled way. If the reader is not satisfied by any of the foregoing accounts of *why* humans are morally considerable and have rights, then the reader should begin with that object of overwhelming overlapping consensus: the claim that human beings are inestimably precious and that their moral considerability and moral status accrue to them in the form of a variety of rights.

In the next chapter, we will discuss rights-holders in the context of the other rights-holders, systems, and institutions to which they are socially situated. Because of their worth, rights-holders make myriad claims against these other moral entities. The next chapter

discusses structural justice and structural violence and it will set up a discussion about what is owed to individuals and communities who are or who have been systematically wronged by other rights-holders and the institutions to which they are socially situated.

## Chapter 4: Structural Justice

### A. Introduction

In the preceding chapters, I have argued for a rights framework in which our moral obligations to one another amount to the obligation to respect rights and the evaluations we make in terms of “justice” are evaluations of whether or not those rights have been respected. So, in the case of our moral obligations to one another, these moral obligations should be conceived of as turning on respect and disrespect for human worth. And when we say that worth has been respected or disrespected, we mean that *one has received (or not) that to which one has morally legitimate claim because of one’s worth*. Right action and wrong action regarding others (or, at least, regarding rights-holders) is determined by the sets of normatively forceful claims that obtain between us. Worth commands respect—that is, it is a feature of human worth that the claims it generates are normatively binding and ought to be answered—and it accrues to individuals in particular social contexts in the form of rights.

Briefly here, I will address *duties of imperfect obligation*; that is, cases in which obligations present themselves as duties to do *X* or not do *X*, but in which there is no corresponding rights-holder in possession of a legitimate claim to *X*. One example might include a case in which a very wealthy person may be said to have an obligation to give to charity, but there is no particular rights-holder commanding or claiming that behavior. Other examples may include instances of obligations to treat animals in some ways but not others or obligations to not destroy precious artifacts, certain cultural practices, or historically and culturally significant landmarks (as in a temple) or land (as in a sacred river or burial ground). The latter two cases are simpler, so I will address them first.

In the case of the proper treatment of animals, in my view it is the case that (at least some) animals command respect and have rights; in cases where I have obligations to treat animals (like dogs) in some ways but not others, those obligations are accounted for not by some human right of the animal, but rather by some morally legitimate claim of the animal

against me. And the claim is given moral force in its supervenience on the animal's worth. In the case of obligations to properly treat artifacts, cultural practices, and land, in my view it is the case that such duties are accounted for by the claims against me held by *potentially very many rights-holders* to the preservation of those artifacts, practices, and land. A sacred space does not have rights; rather, the inheritors of the space or the cultural practitioners who identify with the space's significance *do have claims* against others to their proper treatment of the space. Not to overcomplicate things, but we should conceive of the moral force of our property rights as ultimately derivable from our special moral status; so, too, we can conceive of our duties to treat artifacts in thus and such a way as being derived from a set of something like cultural property rights. And in this view, it is not the *culture* that has morally legitimate claims, but rather all those individuals who constitute the culture or society. If we can conceive of members of organizations as exerting certain exclusive claims, we can conceive of practitioners of a particular culture as exerting certain exclusive claims.

But the first example is trickier—that of the wealthy man who could be said to have obligations to give money to charity. The first thing to be said is that it is not obvious that the very wealthy man *does have such an obligation*. That is, while it would be *very good* for the very wealthy man to give to charity, it is not necessarily a *duty*, and so the problem of being unable to identify a particular rights-holder who makes such a claim against the wealthy man does not necessarily stand. I am partial to this view, according to which charity is supererogatory and not mandated by respect for any particular rights-holder's worth.

But what of the plight of the impoverished? It is also my view that the very poor have rights if not to the eradication of poverty full-stop then to the provision for their basic human needs, like food, water, shelter, some level of education, and healthcare. These rights should be conceived of as claims *against the State*. And it is the State's role to establish in society a set of economic relations within which those rights to provision for basic human needs are answered. So, for instance, there should be a set of tax brackets that empowers the State to

meet the basic human needs of those who do not possess the means to provide for those needs for themselves and their families; and if the very wealthy evade their taxes, such that the needs of everyone else cannot be met, then the very wealthy are certainly in violation of duties proscribed by law and potentially whatever rights that we all have against one another to our good-faith participation in society. In those societies in which there are not such economic relations and legal obligations, and also in which there are the very poor, I grant that the very wealthy *do* have obligations to the poor or to charity; but these duties would not be duties of imperfect obligation, but rather duties *simpliciter*. In such cases, it should be said that the very poor have morally legitimate claims against the very wealthy to their working toward the resolution of their suffering, claims that give rise to the duties and obligations of the very rich if not to a redistribution of wealth then to work that better the situation of the worst-off. Such duties should be conceived of as the complements of the very poor's morally legitimate claims against the wealthy. But to finish, according to my view any person who acts in violation of another's worth is acting unjustly. But were one to act in violation of a duty of imperfect obligation, and not in violation of some correlative rights, we should say that one has done something (simply) morally improper.

Members of the moral community, simply in virtue of their worth, exert a normative force on other members of the moral community in the form of their inherent claim-rights and those rights' correlative duties. No person is a moral island—no person is a moral subject somehow insulated from the claims made against them by other members of the moral community, and no moral subject can enter into the presence of another without their worth and the claims it exerts (the particulars of which depend on the socio-moral context). Our social relations to others and to the institutions and systems in which we are located are the landscape of justice, and our rights are the normatively forceful entities that obtain along the contours of that landscape.

In this chapter, after discussing how *justice* ought to be conceived of as grounded in human worth and rights, I take a structural turn. I examine the relationship between the worth of

rights-holders and the systems, societies, and institutions in which rights-holders are located. After we have examined what, exactly, the relation ought to be between a rights-holder and the systems, societies, and institutions in which they find themselves—and after we have a working notion of what, under my view, *structural justice* is—we can begin to answer questions about that which is owed to individuals and communities who are, or have been, *wronged* (either by other individuals or by the systems and institutions to which the *wronged* is socially situated).

## B. The Relation between Worth and Rights

Rights are normatively binding social relations as against any old relation. I (and Wolterstorff, too) intend for normatively binding social relations to be real normative entities—the claims, and their correlative duties, that obtain between two rights-holders. In this chapter, I'll discuss the normatively binding social relations that obtain between rights-holders and institutions, systems, and organizations like the State. *À la* Wolterstorff, we should conceive of ourselves as placed into a deeply complicated web of normatively binding social relations. The web of social relations in which rights-holders exist is complicated, because there are countless rights-holders and objects of worth that command respect from us, and for a host of different reasons. And each of the rights is contextual—each right obtains in a particular moral context, and some rights (inalienable rights) perhaps obtain in *all* contexts. For example, a state of affairs characterized by “famine” is one moral context, and a state of affairs characterized by “abundance” is another moral context. In those two very different moral contexts, different rights of ours obtain or fail to obtain.

We shall resolve cases in which it appears that two rights conflict by clarifying that, in the given moral context, there is no real conflict between the two rights, but rather what we have is a context in which one of the rights holds (and the other does not) or else neither of the rights holds. We have no need to speak of one right trumping another—in *the context in which a right appears to be trumped*, the “trumped” right simply is not a morally legitimate claim. Each of the various rights tugs at us, from a distance and up close, according to our worth and according to

particular moral contexts. In particular socio-moral contexts, particular rights supervene on human worth—so from social context to social context, one's rights vary, not because one's worth has been altered, but rather because the supervenience of a particular right on human worth is indexed to certain socio-moral contexts—in the moral context characterized by abundance a child has the right to a full belly, for instance, but in the moral context characterized by famine a child can have no such right. Put another way: most of our human rights are not “inalienable” in the sense that one has them *in every socio-moral context*; rather, our inalienable human rights are “inalienable” in the sense that rights-holders have that right *in the socio-moral contexts in which the relevant supervenience relation obtains inalienably*.<sup>194</sup> So, a rights-holder's rights are socio-moral facts that obtain of the rights-holder in the right social situation *because of* other morally relevant facts (human worth, facts of the matter about that which is a life-good for things like us) that obtain of the rights-holder at a more fundamental level. Human worth obtains inalienably in every socio-moral context.

I have no problem, in principle, with a view that grants to a child in times of famine a host of rights that cannot be met—to food, for instance. Such would be a *prima facie* right, and in the context of famine the right is deferred or inert. But take a revised example: a child is hungry, there is famine, and a man has only enough bread for his own children and not for the other child. In such a case, were we to choose the *prima facie* rights explanation of conflicting rights, each child would have a *prima facie* right to the bread that would nourish them. However, because some of the children happen to have a father who has just enough bread for them, they get that to which they have claim but the other hungry child does not. The child who remains hungry is simply unlucky and his *prima facie* right to bread is overridden by the other children's *prima facie* and perhaps *ultima facie* right to the bread. If we take the *prima facie/ultima facie* route to explain what is happening in moral contexts in which it seems rights-

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<sup>194</sup> I will leave it open whether or not there is an inherent human right that obtains in every socio-moral context; that is, whether the right in question supervenes on human worth in every socio-moral context.



holders' rights conflict, then it seems that some rights would trump other rights for non-moral reasons (or at least for reasons not directly pertaining to the worth and rights of the rights-holders involved). The children who get bread and the child who gets no bread do not differ in moral significance; the hungry children who get food in the time of famine are simply lucky.

I have chosen a view that indexes a rights-holder's rights to their moral context, rather than claiming that each right obtains in all moral contexts, due to cases just like the one just covered. I resolve this case of two rights-holders with seemingly conflicting rights by appealing to the socio-moral context: in that context, the one hungry child does not have a right to the bread that the man's children need and the man's children do have that right to the bread. Rather than two rights conflicting and the one trumping the other for non-moral reasons, we can resolve a seeming conflict of *prima facie* rights by appeal to the socio-moral context and by appeal to which rights do and do not obtain *in that context*. What explains why the man's children get the bread, but the hungry child does not? The children's claims against their father, and his duties to them. But that the children happen to belong to the man with bread and that the hungry child does not is hardly a difference in moral considerability or human worth between the sets of children; rather, it is a difference in their socio-moral context.

I take it to be true that the hungry child does have claims against the people and world around him to their working for a world in which he is no longer hungry; however, those sorts of claims do not amount to a particular claim to the bread that man has somehow secured for his children. One may object: *but what of a ruler who engineers a famine, and prolongs it, so as to justify withholding from his subjects that to which they otherwise would have morally legitimate claims?* Again, I take it to be true that the hungry would have legitimate claims against the ruler, if not to the food they need, then to a cessation of the famine (assuming this ruler is evil and has engineered and is prolonging such a terrible situation) and a resolution to the unavoidable and tragic socio-moral context, such that their physical needs could possibly be met.

My view of rights that obtain from moral context to moral context can also be contrasted with a view that would say something like the following: that one always has some right, *X*, but that *X* is only relevant in certain circumstances (as in, when one is not being treated in accord with what *X* demands). But that view is subject to charges of arbitrariness—if one has right *X* in all circumstances, but *X* is only sometimes relevant, who is to decide when one's right is relevant and when it is not relevant? Why would a right that one has be only sometimes relevant or only sometimes morally forceful? To avoid that problem, I, instead, conceive of objectively normatively binding rights obtaining in some socio-moral contexts but not others. So there will never a case in which one has a right, but also in which the right is not morally forceful; in my view, when one finds oneself in a socio-moral context in which right *X* obtains, that right to some life-good ought to be upheld.

My talk of individuated socio-moral contexts allows for some commonsense fluidity in considerations of rights. The case of a rights-holder's hunger in times of abundance and famine is a good example. Most will agree that in times of abundance (one socio-moral context) there is a human right to some baseline of sustenance and nourishment—the hungry and full alike have claims against the individuals, systems, and institutions around them to that baseline of sustenance and nourishment. But what happens when we alter the socio-moral context? Place that same rights-holder into the socio-moral context of famine, and what happens? We could conceive of a rights-holder, say, in a time of extreme civilization-ending famine, having claims against the people around him to food. But such claims would entail correlative duties to the claimant to provide them with food—and, in a time of such intense famine, how are we to conceive of those duties to feed the hungry, assuming that if the famine is bad enough *the duties cannot be met*?

Imagine an extreme scenario in which nobody has any food, and it is impossible for the normatively binding claims of the hungry to be met—would that mean the hungry rights-holder is being *wronged*? I think not. I take it that in *that* particular socio-moral context, there are no

such claims to a full belly. Otherwise, we would be talking about holding people morally accountable for meeting duties that are impossible to meet and answering claims that are impossible to answer. This is not to say that humans do not have inalienable rights to that baseline of nourishment; it is just to say that in the socio-moral contexts in which their claims cannot possibly be answered, we should not think of those claims as obtaining, and it is to say that in those socio-moral contexts in which the rights-holder's claims *can* be answered those rights supervene invariably on their worth, whether they are hungry or not. In a moral context such as *extreme civilization-ending famine*, nobody is at fault for failing to meet such a claim to that baseline of nourishment, and in my view, there *is no such claim*. None of that implies that the hungry rights-holder is any less valuable in times of famine and it does not ignore their human suffering; it just means that in that particular socio-moral context, the claims to basic nourishment do not supervene on their ineradicable worth.

Inherent human worth and inherent human rights are moral properties that obtain of the very same individual at two different levels of analysis. Worth is a morally salient property that rights-holders have at the more foundational level, and worth serves as a supervenience base for the higher-level moral property, the right. Rights and duties thus conceived are the moral facts about us that are salient at the level of our social relations to others—they are inalienable human worth placed into social situation in tandem with all the objective facts about that which is good for things like us, and they give our social relations to others their normative aspect. And because rights-holders are both intrinsically valuable and intrinsically socially situated, all moral contexts are social contexts, and in all social contexts there will be talk of some right or another.

One might worry that a supervenience relation establishes that when there is a change at one level then there is a change at another level, and that surely we do not want to say that when we enter one social situation from another, since our rights change our worth also changes! The worth that most concerns the rights theorist is supposed to be ineradicable and a change of rights from context to context should not indicate a change in ineradicable worth; I

grant that and suggest, instead, that *the supervenience itself* of a particular right on worth is indexed to particular social contexts (according to our social situation and to those objective facts about our interests and life-goods in those situations). That is, every time individual *X* finds himself in social context *Y*, *X*'s ineradicable worth generates set of rights *R*, necessarily; but there may well be a social context *Z* in which individual *X* lacks *R*. What has varied when one "loses" or "gains" a right from context to context is not one's ineradicable worth, but rather one's moral context and social situation.

And take again the case of the evil ruler who could prolong or even engineer a famine so as to avoid getting to people that to which they have legitimate claim: in moral contexts in which it is impossible for a claim to be met, the claim does not obtain, but that does not mean that the rights-holders have no other claims or set of claims relevant to the situation. So, the hungry child has no morally legitimate claim to food in cases where there is simply no food, but certainly the hungry child has morally legitimate claims against those with the power to bring about changes that would make it possible for the child's needs to be met.

If you throw something of a sufficient kind and amount of worth into a particular socio-moral context—if you place it into a particular web of social relations to other things, beings, and itself—that thing will have a plethora of rights (and correlative duties).<sup>195</sup> Its relations to other things (in the right contexts) will have a moral character *because of its worth and the respect that worth commands* and that complex web of social relations will be one of *normatively binding* social relations because respect is *due* to things of the requisite objective worth. Failure to respect another's worth is the failure to reckon with another on the terms set out by that

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<sup>195</sup> That is not to imply that a rights-holder can ever leave a social situation. I am committed to an individual's being intrinsically socially situated. An individual is never non-socially situated. Even the person alone on an island occupies a social situation. They have, for instance, claims against the industrialized powers to their not melting the ice caps and flooding the real estate of the marooned. Or you could imagine a rights-holder stranded alone on another planet—surely, this rights-holder would have claims against the humans far, far away to their not destroying the planet. Or you could imagine a universe occupied by only one person and no other rights-holder or moral agent; in such a case, surely that being has certain claims against and duties to their own self that can vary from moral context to moral context.

individual's worth; it is the failure to act regarding him according to what is due to him. Claims can be denied or flouted, but only in defiance of the respect their worth commands and it is an injustice every single time.

One might be concerned that there is no way, without some principle or set of principles, to derive just from the worth possessed by individuals the set of rights that most would take to be constitutive of the full suite of our inherent human rights. How do we get, for example, a child's right to a basic level of education, simply from the moral facts that obtain of that child—that the child is of great ineradicable human worth, that the child is set into a complex web of normatively binding social relations to us, and that the child either is or is not in one of the contexts in which the right to a basic education obtains. If not some bridge principle or set of bridge principles, why should we think that the *worth* of the child generates for that child sets of claims to, for instance, a basic level of education (at least in many social contexts)? The United Nations Universal Declaration of Human Rights is replete both with human rights that would not surprise most of us (like the right not to be tortured) and human rights that might strike very many as over-reaches of moral theorizing (like a child's right to an iPad for at-home instruction, the right to travel over national borders unregulated, etc.).<sup>196</sup> Had we a list of principles or rules, we could derive a robust list of the rights that persons have—we might even deliver that list to the authorities, they could enforce it, and the world would be far better off. Many of these as-yet unmet claims are examples of Feinberg's "manifesto rights."<sup>197</sup> In my view, there are moral contexts in which these rights obtain and individuals or institutions are beholden to them and there are moral contexts in which these rights do not obtain and no entity is held under a duty to answer them. The people in societies that are characterized by moral contexts in which these rights obtain are *owed*.

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<sup>196</sup> United Nations, "Universal Declaration."

<sup>197</sup> Feinberg, *Social Philosophy*.

I will not attempt to provide that exhaustive list of rights, but I will simply say: human worth, in conjunction with objective facts about the interests we have in virtue of the sorts of things we are, commands certain treatment and precludes other treatment. What I do need to provide, however, is some epistemological starting point that can serve as a foundation for my later claims about rights to race reparations. I will do that now.

There is a school of thought called specificationism, and according to it there are no absolute rights, but rather rights have their definition in a delineated set of conditions that establish when the right does or does not obtain. The specificationist, who insists (like I have) that rights are indexed to particular socio-moral contexts, has to fend off objections that accuse the specificationist of offering an epistemically untenable view—that the full list of rights one has is unknowable.<sup>198</sup> After all, the reader can imagine the vast scale of recording such a delineation of exactly the contexts and circumstances in which each right obtains and does not obtain. But the epistemic worry faced by the specificationist and the broader epistemic worry that without bridge principles we do not know how to construct a corpus of rights are not worries that are off-putting to me—the objectively right and wrong ways to treat beings of particular kinds and amounts of worth obtain, with or without a list.<sup>199</sup>

I grant that if one insists on an elucidation of the right and wrong ways to treat others in virtue of their worth in a given social context, what is needed are some epistemological standards for accepting one another's judgements that a certain behavior does or does not express proper respect for human worth in the context in question. I take it that such an endeavor will need to be intersubjective, our intuitions about that to which our worth entitles us needing to be tested against others' intuitions. It will require a popular epistemological standard

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<sup>198</sup> For examples of specificationism, see Shafer-Landau, "Specifying Absolute Rights" and Oberdiek, "Specifying Rights." For examples of the view's critics, see Sinnott-Armstrong, "Moral Dilemmas" and Kamm, *Intricate Ethics*.

<sup>199</sup> Ontologically, they are not off-putting to me. In theory, the morally legitimate claims are there, whether we know about them or not. I grant that pragmatically these epistemic worries are troublesome. But any moral theory wrestles with such epistemic problems.

(or set thereof) for judging our intuitions about human worth and the claims it generates in particular moral contexts, and it will require more: we will need to discuss whether or not our moral intuitions about how to treat beings of thus and such a kind in various contexts are reliable *at all* (I think they certainly are!), we will need to discuss how to appeal to the broader moral community when it comes to finding moral consensus about the proper treatment of others, we will need to clarify the contexts in which a given right does and does not obtain, and we will need to seek some sort of mechanism for settling the inevitable moral disagreements between individuals and societies about which rights do and do not obtain and in which contexts. These are worries for any theory that appeals to fundamental moral concepts and over which there can be expected to be some disagreement.

Resolving these concerns would require several more chapters, so I leave those universal problems from moral epistemology unfinished here. But of course it should be noted that one's inability to give a thoroughgoing justification for why *X* is a right and *Y* is not, and one's inability to answer those fundamental epistemological worries, does not indicate that one is either not justified or simply incorrect in holding that *X* is a right and *Y* is not; neither does it preclude one from holding to a reasonable and practicable model. Intersubjectively, spanning moral contexts that vary radically, the moral community will need to work toward an extensive corpus of rights that can be broadly agreed-upon, along with establishing mechanisms for handling disagreement within the moral community. Indeed, this was much of the project of the UN's declaration of rights.

And Rawls proceeded similarly, providing only illustrative examples and never claiming to attain to the creation of a completed list. Rather than compiling a definitive list, Rawls carves out space for further reasoning about rights by reference to those moral entities required by those with his two moral powers; for this, Rawls offers a process for moral agents to use as they

learn more about their society and establish what they can require of one another.<sup>200</sup> Rawls is explicit that his project is political, not metaphysical. I have offered a metaphysics and I have offered that where my metaphysics of rights falls short or fails to inspire consensus, we simply must get on with the broader rights projects; because, after all, there is general agreement that *there are rights*. Rather than compiling a definitive list of all the rights I take it there are, in my view I carve out space for further reasoning about rights by referring to those life-goods that objectively further rights-holders' well-being and by reference to whatever claims human worth gives rise to from moral context to moral context.

I will claim that Black Americans living today, in particular, are owed direct and structural reparations for the historical wrongs committed against the Black community and for the wrongs that continue to accrue today. But what justifies *that* claim? How do I get from the inalienable human worth of Black Americans, objective facts of the matter about that which is a life-good for every human, and empirically verifiable historical facts about the treatment of Black Americans to the claim: Black Americans have been disrespected and have morally legitimate claims to race reparations. The basic argument for that claim should be structured like this:

1. Black humans have immense, ineradicable human worth, in virtue of their *humanity*.
2. Beings of thus and such a worth command respect. That is, any morally legitimate claim of theirs is normatively forceful.
3. Morally legitimate claims are normatively binding, so to violate one makes one blameworthy; to violate intentionally is a wrong and, definitionally, is an instance of injustice.
4. On human worth, claims supervene against other individuals—and against the systems and institutions in which Black humans have always found themselves—to certain treatment and life-goods. The particular goods and

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<sup>200</sup> Rawls, *Theory of Justice*.



- treatment to which humans have claim vary from context to context but are determined by objective facts of the matter regarding that which is good for things like us, humans.
5. These claims preclude the permissibility of many of the historical wrongs committed against Black humans: institutions like human chattel slavery, police brutality, hate crimes and racial slurs, racist economic or housing policies that impoverish or disadvantage Black humans, etc.
  6. Violations of such claims result in real psychological, bodily, or economic damage, the latter of which can compound over generations of injustice.
  7. So, Black people have historically been wronged, and to the extent that these race-related wrongs continue, at least some Black people are currently wronged by them.<sup>201</sup>
  8. Those individuals, institutions, or organizations that committed (or commit) the wrongs are blameworthy and ought to be held accountable.
  9. Corrective justice and redistributive justice need to be applied to instances of such wrongs.
  10. Those who violate the rights of Black rights-holders, then, ought to be punished in accordance with the law, and reparations ought to be rendered such that the well-being of the wronged is as if the wrong were never

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<sup>201</sup> Examples of the continuation into the present day of a historical wrong are racialized disparities in wealth that are traceable to human chattel slavery, Jim Crow employment policies in the South, and racist redlining and mortgage lending policies. No contemporary American is enslaved, but plenty of contemporary Americans did not inherit wealth from their parents; and such disparities are acutely racialized. Of course, there are plenty of economically disadvantaged people in this world whose economic situation cannot be said to be the product of structural racism or human chattel slavery. Each instance of disadvantage will have its own etiology—some evaluable in the terms of justice and injustice, and some not. Every person is equally worthy of respect and has morally legitimate claims against others to the appropriate level of well-being, but not every person is *owed compensation or reparations for past and present racial wrongs*. A complete account of justice will have answers for every instance of structural disadvantage; but in this chapter, I am addressing those instances of disadvantage that are racialized or the product of direct or structural racism.

committed, or such that the well-being of the wronged is improved to that point to whatever extent possible.

11. These wrongs, then, generate for Black rights-holders new claims against the State to its execution of justice; and they generate for Black rights-holders new claims against those who wronged them to repayment for damages.

12. Therefore, in virtue of past and present wrongs, at least some Black Americans have morally legitimate claims to corrective and compensatory justice; that is, race reparations.

One might raise a concern here, about a rights-holder's inability to answer a given morally legitimate claim, and what that means for that claim. Take the problem, posed this way: *enslaved Black people in the USA were mistreated. But in that point in history, it was impossible for them to obtain their rights. Any individual slaver could have freed their slaves, but they could not have put them in a situation in which all of their rights would be respected. Therefore, Bobby, since in your account rights that cannot be answered do not obtain, those slaves' rights did not exist. Therefore, these slaves or former slaves, and much less their descendants, cannot claim compensation.* This is an important set of concerns that helps to clarify what my account says and does not say.

Remember that I have claimed throughout that the rights one has depends on one's socio-moral context. In differing socio-moral contexts, our human worth is constant, but the social, economic, environmental, cultural, technological, and physical conditions we find ourselves in differ widely. Across time and across geography, these variations in socio-moral context can be expansive. So, we have both:

- a. the enslaved had the same human worth and grounds for respect that any human today has, but
- b. the enslaved existed in a socio-moral context that differs greatly from today's socio-moral context.

So in light of that, we need to ask and answer: *What human rights did the slave have?*, *Against whom did the slave have those rights?*, *Which rights would have obtained for the enslaved in some moral contexts (like the context we find ourselves in today), but did not obtain in their actual socio-moral context because factors unique to that socio-moral context rendered some claims unanswerable?*, and finally, *What compensation, then, is owed to those who were wronged in that socio-moral context and to their descendants in the socio-moral contexts that followed?* I would offer that each enslaved person possessed morally legitimate claims to their freedom against their slaver and against the nations that sponsored a slave trade. In holding slaves and perpetuating a slave economy, slavers, the nations that sponsored a slave trade, and those who participated in and benefited from a slave economy were in violation of each enslaved person's claims to freedom. And each enslaved person was owed compensation for years or decades of stolen life and labor; similarly, their descendants are owed compensation.

It is incorrect to say, since it would have been impossible for a slaver or nation to situate a freed slave such that they would have enjoyed full human respect in that time period (the intractable bigotry on display today is just a shadow of the bigotry of that time period), that the enslaved person *had no claims against the slaver or nation*. We can readily identify at least one morally legitimate claim that was, from day one of the international slave trade, actionable no matter the socio-moral context: each enslaved person's morally legitimate claim to being free. The violation of those claims amounted to generations of stolen wealth and life, and compensation of some kind and measure can certainly be said to be owed, regardless of whether or not other rights obtained for the enslaved in that socio-moral context. I hold that other rights *certainly did hold for the enslaved*—claims of the enslaved or formerly enslaved against every individual around them to decency and fair treatment, claims of the enslaved or formerly enslaved against local institutions to a fair application of law enforcement, claims of the enslaved or formerly enslaved against their government to new policies that would yield greater economic and educational equity, and so forth. And the violations of these claims were *wrongs*,

and merit further compensation. My view does not commit me to holding that since in *that particular socio-moral context* no slaver could possibly have ensured that a former slave would be respected according to their worth, then the enslaved had no claims against the slave owner; the enslaved possessed a manifold of rights against slavers that were viciously violated over and over again, but one of these was not some underdetermined claim against a slaver to their guaranteeing full legal status for the enslaved and the transformation of bigoted hearts.

The failure of a right to obtain in a particular socio-moral context is a function of whether or not that particular claim *can possibly be met*. In a time of famine when literally nobody has food, nobody has the right against any other to a full belly, though perhaps the famished do have claims against their nation's leaders to their working to resolve the widespread hunger (assuming such a course of action is possible); in famine that is localized, hungry people in the famished nation probably do have morally legitimate claims to food against the people and nations in other parts of the world that are enjoying abundance. In even the cruelest of socio-moral contexts, every slave had morally legitimate claims to (at least) freedom, full human respect and standing under the law, and fair treatment from the people around them—that is, those against whom those claims were made were absolutely capable of meeting those claims. To the extent that it was *literally impossible* to realize some life-goods in that socio-moral context, some rights likely failed to obtain in that socio-moral context. For instance, one might say that to whatever extent any human enjoyed a morally legitimate claim to the best college education available at the time, every newly freed slave had a morally legitimate claim to the best college education available at the time. I am not opposed to that in any sense. But in my view I have simply attempted to be sensitive to the realities of that socio-moral context—that for many formerly enslaved (given the realities of the educational and wealth gaps created by the system of slavery, and given their life situation and age) higher education would not have been accessible.

Of course, all along enslaved persons had morally legitimate claims to access to the tools of literacy and education, and these claims were violated. Too, they surely had claims against others and the State to their working to establish the conditions necessary for educational equity. But to wrap up, that some right or set of rights failed to obtain (because of the impossibility in a particular socio-moral context of meeting a particular claim) does not entail that *no rights at all obtain* and the same goes for the compensation that is due to rights-holders because of the violations of rights that did obtain.

The twelve-statement argument above relies on a handful of judgments provided by folk moral psychology and on some stipulations from my Wolterstorffian account: that Black humans have immense, ineradicable worth; that human worth in tandem with objective facts about our interests commands respect in the form of legitimate claims to some forms of treatment but not others and some goods but not others; that one of the basic rights had by any human is a claim or set of claims against unwarranted suffering or violations of their autonomy; that rendering justice to cases of injustice is at least sometimes (i.e., in cases where damages are done) one-part punitive and another-part reparative. So here, I have not given the reader a guide to constructing an extensive list of every right had by every rights-holder in every socio-moral context, but I have provided a line of moral reasoning with which one can go from the ineradicable worth of Black rights-holders directly to the morally legitimate claims of (wronged) Black rights-holders to various forms of race reparations for past and present wrongs.

### C. Rights and Justice

At the very beginning of this work, I insisted that my work would be guided by the search for answers to two fundamental questions:

Q1.        *What is justice?*

Q2.           *What are the requirements of justice with regard to Black Americans today, in light of historical wrongs?*<sup>202</sup>

Over one hundred pages later, and I have spent little time on those questions. But we are finally ready to answer the first of those two questions.

So, what is justice? In my framework, justice (or injustice) is a property of socio-moral states of affairs, those states of affairs in which individuals who are intrinsically socially situated make their claims against one another, against groups and organizations, and against the State with a normative force that comes from their worth. A state of affairs in which individuals and institutions treat rights-holders with the respect that is due them in virtue of their worth can be characterized as *just*; evaluating *respect for worth* just is an evaluation of whether or not a rights-holder is getting those life-goods to which they have legitimate claim. So far I have focused on inherent human worth and the inherent rights that come from that worth; but justice must instantiate respect for conferred rights, too, because a violation of someone's conferred rights still disrespects them.<sup>203</sup> A state of affairs is just in which every rights-holder is treated in accord with their morally legitimate claims; a particular relation between two rights holders is just in which the claims that obtain between the rights-holders are met.<sup>204</sup> But justice and injustice are also properties of *societies themselves*, and the justice or injustice of a society will be the most relevant ground of discussion in what follows, when I will be discussing structural injustices.

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<sup>202</sup> In Chapter Five, we will explore the demands of justice with regard to those who have been wronged directly, to those who descend from those who were wronged directly, and to groups. Each different sort of case requires a different reparative response.

<sup>203</sup> The normative forcefulness of conferred rights needs unpacking, but I will not spend much time on it. I propose that the worth of rights-holders gives their conferred rights normative force, too, even though those conferred rights should not be thought of as supervening on human worth or on worth that supervenes on some morally insignificant property. A violation of an individual's conferred rights is still a violation of the grounds for respect that individual has—their human worth—even if the way we account for an individual's conferred rights is different than the way we account for an individual's inalienable rights. Conferred rights do not supervene on worth, then, but *are* normatively forceful because of it.

<sup>204</sup> Justice and injustice, in my view, are sensitive to rights being met or not. *Justice* tracks normatively binding social relations and whether or not human worth is respected; when claims are violated, new claims are generated to corrective and compensatory justice.

The correction of injustice amounts to a correction of wrongs, to a restoration to the rights-holder of the goods and treatment to which they have morally legitimate claim. We cannot have a proper sense of what justice is, removed from talk of that which is owed to individuals in virtue of the worth that supervenes on their humanity, and we cannot have a proper sense of what *injustice* is, removed from talk about disrespect for worth. Truths about justice are ultimately truths about morally legitimate claims and the sources of the rights in question. In my framework, then, justice is not ultimately to be conceived of in terms of social contract or moral laws or maxims about utility or the proper treatment of ends or divine command; in my framework, justice, like rights, is best thought of as turning on *worth* and the morally legitimate claims that obtain to certain life-goods. My justice-as-rights view does not necessarily preclude any of these other notions from the history of philosophy.

In my view, an instantiation of justice in a given state of affairs or society, then, just is an instantiation of proper respect for the worth of the rights-holders in that state of affairs; justice obtains in states of affairs where claims are met, and injustice obtains in states of affairs where claims are violated. So there is very little conceptual space between our moral judgments regarding others and our judgments about justice—in my framework the right thing to do regarding others, the good, our moral responsibility to others, rightness and wrongness regarding others, and the aspirations of society with regard to others all turn on respect for human worth and inherent human rights (and on respect for any morally legitimate claims that are, strictly speaking, *conferred* and not the product of any inherent worth). There are activities that are wrong and immoral, of course, that have little or nothing to do with disregard for human worth and the rights that supervene on human worth—like wrongly harming an animal, for example—and that require an accounting for both their wrongness and their injustice that does not appeal to human worth. But in the domain of our socio-moral relations to other people, I do intend for this to be a unification of our justice concepts and our human rights-concepts. Rights and worth are at the bottom, the normatively binding claims on others that obtain in particular

social contexts; justice is at the top, characterizable in terms of whether or not those normatively binding claims at the bottom are met. Considerations of justice *just are* considerations of the rights and duties of one another, of the State, of salient groups or institutions, etc. Thus, justice is grounded in respect for worth and the claims it generates.

Whole societies can be qualified as *just or unjust* and they can be qualified as *justly or unjustly structured*. The just society is an ideal to which we aspire<sup>205</sup>, but we approach that ideal with limits, given the realities of scarcity, limited resources, and the human condition. The justly structured society, however, is attainable, and it should be considered our goal, if there are to be collective political and social goals. I conceive of the justly structured society as that society which is structured:

- i. in such a way that persons *can be* rendered all of that to which they have morally legitimate claim by other members in the moral community,
- ii. in such a way that persons *are* rendered all that which they are owed by the State and other public institutions, and
- iii. in such a way that persons are protected by enforceable laws from actions of others who would demean them or withhold from them their right.

In the justly structured society, a State will enforce the new claims to corrective and compensatory justice generated by an injustice.

In examining the structure of our society and whether or not it is just, we should examine our society's laws, its distributions of resources, and the ways its institutions advantage or disadvantage different groups. My first condition of the justly structured society claims simply that the justly structured society will *not* be structured such that it is *impossible* for the worth of every rights-holder to be universally respected—the justly structured society makes it, in

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<sup>205</sup> Amartya Sen denies that “the just society” is a helpful ideal, and instead offers that the goal should be continuous movement toward a more just society; see Sen, *Idea of Justice*. In my work, I have maintained that the just society is like a limit we can approach. And I would just insist that a working idea of “the ideally just society”—whether or not it can ever be actualized—informs our judgments about what constitutes movement toward are more just society.



principle, possible for a society to wholly instantiate justice. My second condition of the justly structured society claims just that, in the justly structured society, the State and other public institutions (like public schools, law enforcement agencies, etc.) *do* respect the worth possessed by those things which are morally considerable. If the state or some public institution *wrongs* an individual or community, the State or that institution ought to be reformed and any damages repaid, or else the society can no longer (if it was in the first place) be conceived of as justly structured. My third condition of the justly structured society claims simply that, in the justly structured society, there are laws and procedures in place that protect the rights of rights-holders and according to which one who has been wronged has legal recourse in response to the unjust actions of the individual, state, group, or institution responsible for the injustice, such that corrective justice and compensation are rendered.<sup>206</sup>

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<sup>206</sup> Professor Jacob Adler contends that, rather than conceiving of rights as I do (as obtaining only relative to particular socio-moral context), cases where rights standardly obtain but then for whatever reason do not obtain are best explained in terms of *prima facie* and *ultima facie* rights. He offers this example to show a potential problem with holding, like I do, that a particular morally legitimate claim does not obtain in cases where it cannot possibly be met: “Bobby lends Jacob \$1,000. Jacob promises to repay on June 1. On June 1, Jacob can’t pay. The right is extinguished. Subsequently, Jacob gets in better financial shape, but since the right was extinguished, he doesn’t pay. Bobby sues. Court rules for Jacob, saying that Bobby’s right was extinguished on May 1, so he is not being disrespected now.”

I hold, above, that when a person *cannot* meet another’s claim against them—as in, someone’s claim to food in a time of famine—there can be no morally legitimate claim of one person against the one who’s unable to meet the claim. I hold this, because I conceive of rights as normatively binding socio-moral claims, and because no one can be normatively bound to doing what they actually cannot do. Rights are like moral gravity, and the rights *tug* at others when they obtain, and cases in which rights *do not tug* are best explained by saying that the rights simply does not obtain *in that context*. So, in such a case, there is no right. What is happening in a case when, for example, one’s standard right to food goes away in times of famine is that the socio-moral context has changed; the socio-moral context in which one has a morally legitimate claim against me to food ceases to obtain, so the morally legitimate claims that are indexed to that particular socio-moral context cannot obtain. When the necessary socio-moral context returns, the morally legitimate claim to food returns. Strictly speaking, it is not the case that *one has ceased to have the right under consideration in the particular socio-moral context*; rather, the socio-moral context has changed.

I offer that Professor Adler’s objection does not sink my account of rights as obtaining in particular socio-moral contexts (rather than obtaining always but being sometimes suspended or insalient). I would answer Professor Adler’s objection above by pointing out that one should not enter into that kind of agreement; one should clarify in their contract that a debt between two parties would not simply expire following a repayment date and that were one party unable to repay the other by some agreed upon date legal action should be taken. We should characterize the rights landscape in the purported counterexample like this: the lender has claims against the indebted to repayment according to the agreement between the two. In a case where the claim *cannot be met* by the indebted—as in, when their bank account is empty and they cannot make the payment—the socio-moral context is such that no right

Less formally, take some examples: in a justly-structured society, every rights-holder *can* be respected. So, the laws of that society do not prevent the society's members from being treated in the ways they deserve to be treated. So, any society with institutionalized slavery or legally established gender discrimination would fail to meet condition (i). In such a society, disrespect for some rights-holder's worth is *codified*. The injustices committed against some rights-holder is a *feature* of the system. In a society in which grave injustices are legally established, the instantiation of injustice is an inevitability. Take another example: any society with social institutions (like police departments) that commit wrongs and are permitted to commit wrongs is an unjustly-structured society. An institution like a police department is a furniture piece of society; if one of the public's institutions is itself engaged in wrongs (like police brutality), the society is disqualified from being justly-structured. And finally: imagine a society in which there is no recognized or sanctioned method for correcting wrongs. In our society, we *do* have a recognized and sanctioned method for correcting wrongs—the courts and the justice system.<sup>207</sup> But if we did not have such a method, wrongs would persist without a final backstop or any real hope for correction. Justly-structured societies have judicial processes designed to mend instances of injustice.

The difference between the justly-structured society and the just society can be illustrated with a picture: gardens require constant work and maintenance, with ongoing needs for weeding, pruning, and fertilizing. A garden is never finished, or fully realized. In the real

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obtains to *repayment on that day*. Surely, though, various other rights still obtain, according to the agreement between the lender and the indebted—rights of the lender to collect higher interest on the loan, rights of the lender against the indebted to pursuing legal action, rights of the lender against the indebted to collect the payment in whatever way provided for by the contract between the two parties, or rights of the lender against the indebted to the indebted's doing whatever is in their means to do in order to repay the debt in a timely manner. Were it the case that the two parties foolishly entered into an agreement that did not allow for a scenario in which repayment could not be made on the allotted date, and were it the case that the indebted refused repayment after that date and the courts backed the indebted per the contract, then we should say that the lender has no *legal* claim against the indebted, but that the indebted has disrespected the lender and violated morally legitimate claims nonetheless. Were it to pan out as just explained, this would be an example of jurisprudence failing to be sensitive to the moral rights terrain.

<sup>207</sup> Of course, our recognized methods of righting wrongs are far from perfect, and they have played their own role in the commission of certain wrongs and the perpetuation of other wrongs.

world, justice is never fully instantiated, because justice is an ideal notion to aspire to, and because given what we know about human nature and human history there will always be some instance or other (big or small) of disrespect for a rights-holder's worth.<sup>208</sup>

We will address Q2 soon, which asks what the demands of justice are for Black America. That question just is another set of questions: *In what ways have members of Black America been wronged, in what ways is Black America currently being wronged, and what goods or treatment are due to rights-holders in light of the manifold of ways disrespect has been shown for Black America's worth and rights?* Questions of justice are concerned with both questions of interpersonal relations and questions pertaining to how our laws are written and institutions structured. So, a holistic discussion of the requirements of justice with regard to any wronged individual or group will need to cover individual incidents of disrespect for worth as well as the more entrenched (and more difficult to locate) issue of structural injustice and while some of the requirements of justice will orient us toward discussions about interpersonal behavior and attitudinal dispositions, other aspects of this conversation will point us in the direction of policy solutions and structural reform.

#### D. Structural Justice

In this section, I will present justice in structural terms, incorporating the concepts of *direct* and *structural violence*. Richard Rubenstein provides an insightful way to conceive of violence and injustice *structurally* that I will adopt here—with Rubenstein's concepts incorporated, my broadly Wolterstorffian account of justice and injustice can speak in structural terms and address the sorts of injustices there are that are not strictly interpersonal.<sup>209</sup> Shortly, they will enable me to speak more comprehensively to the sorts of injustices to which Black Americans have been subjected and the new claims that arise from those injustices.

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<sup>208</sup> Originally, I suggested that the difference between a just society and a merely justly structured society is the difference between a baked cake and a countertop with all the ingredients necessary for a cake laid out in preparation. Professor Jacob Adler pointed out that cakes, unlike just societies as I have defined them, can be fully baked and final. So, at his suggestion, I opted for the far healthier option of gardening.

<sup>209</sup> Rubenstein, *Structural Conflicts*.

Rubenstein's claim is that justice and violence ought to be conceived of in structural terms and that much of the violence and injustice in the world are products of *structural* injustice; Rubenstein highlights how, in the real world, failure to address structural injustice only perpetuates both direct and structural violence.

In addition to addressing the injustices that obtain between two moral agents and the disrespect for the worth of persons those injustices represent, any theory of justice must also have the conceptual resources required for addressing *structural* injustice, structural injustice being the sets of wrongs that are committed as a consequence of patterned social arrangements and social structure. One's theory of justice must be sensitive to concentrated disadvantage, to use Elizabeth Anderson's language,<sup>210</sup> because in situations of concentrated disadvantage rights-holders are denied *that to which they have morally legitimate claim* (even though there is no moral actor who is singularly at fault). If a theory of justice lacks the resources necessary for evaluating the wrongs that accrue in virtue of social structure, that theory of justice cannot give a full accounting of the rights and wrongs that there are.

This, of course, is controversial; conservative political philosophers are committed to the view that the only relevant moral actors are individual persons and that speaking of being *wronged* by a structure or institution is a misclassification or category error. I do not wish to take up that debate here. I insist that structural disadvantages are evaluable in the terms of justice, on grounds that in such cases rights-holders are clearly withheld that to which they have morally legitimate claim, and the moral agency involved in the wronging of the victim of structural injustice is found with the persons who control the unequitable distributions of resources or the persons who compose the "immoral" institution. In cases of concentrated disadvantage, the *wrong* is a product of social structure, or of the actions of some collective or individuals who compose the system in question, and justice requires that moral agents work (individually or collectively) to alter the relevant social relations. My theory of justice evaluates the injustices

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<sup>210</sup> Anderson, *Imperative of Integration*.

committed by individuals in terms of violations of the morally legitimate claims of rights-holders had in virtue of their worth, and it will evaluate instances of *structural* injustice and concentrated disadvantage in those very same terms. The social structure under examination ought to be such that the systems, institutions, and social arrangements that constitute society do not deprive rights-holders of that to which they have morally legitimate claim.

All of this is just a conjunction of my Wolterstorffian rights-first theory of justice and Rubenstein's and Anderson's works on structural injustice and concentrated disadvantage. The deeply complicated webs of normatively binding social relations we find ourselves in are not composed exclusively of rights-holders. Entire nations are in that web, as are other institutions, organizations, economies, complexes of social arrangements, and patterned distributions of resources—and rights-holders are related to other rights-holders and to those other morally salient entities in ways that accrue to their advantage or disadvantage. Structural injustice is ultimately a variety of disrespect for the worth of rights-holders in which the moral agent doing the *wronging* may be a collective of individuals, or an institution composed by individuals, or a nation operated by individuals.

A person can wrong another person directly and persons can wrong other persons indirectly via law, treaty, group, or governmental agency. Standing social arrangements and resource distributions can similarly result in rights-holders failing to get that to which they have morally legitimate claim. And it is these instances of structural injustice that perpetuate much of the disrespect for the worth of rights-holders that can be found in our world. Much of the disrespect for the worth of persons that is intractable is a *structural* disrespect for the worth of persons and when we speak of that structural disrespect for worth and the concentrated disadvantage that accrues because of it, we speak of structural injustice. In such cases, the buck stops with the agents who either compose the unjust structure or who control the unjust structure; when we say that an international *corporation* wrongs the global poor, for instance, we should mean that there are individual moral agents (or an assembly thereof) at fault for the

injustices and ultimately responsible for any reparations that need to be made. If the agents responsible for the wrong and correcting the wrong do not do so, then we should conceive of the State and its various institutions as being the relevant moral actors.

Even if there is no identifiable moral actor responsible for the injustice in question, there are identifiable moral actors responsible for the injustice's resolution. Otherwise, we would be left with a view that holds a *patterned distribution of resources*, for instance, to be responsible for correcting itself—an impossibility—or else that we ought to simply tolerate the injustices that there are. To hit it from the positive side, structural justice requires a systemic, institutionalized respect for the worth of rights-holders; structural justice requires a systemic, institutionalized answering to rights-holders' morally legitimate claims. Structural injustice tends to be more difficult to locate than more ordinary instances of injustice, responsibility for structural injustice is shared, and in liberal democracies like ours the alleviation of structural injustice requires collective action and systemic and institutional reform. Practically speaking, then, addressing structural injustice requires maneuvering around certain epistemological and political barriers. In the final chapter, I will ask and answer questions about race reparations, and that will require a theory of justice that is sensitive to the injustices committed against the Black community by both individual and structure, and the different kinds of claims to compensation and reformation that arise from those different kinds of injustices.

Rubenstein explains his notion of structural violence, building on Johan Galtung's work.

Let's begin with Galtung's framework, which I endorse:

... let us say that violence is present when human beings are being influenced so that their actual somatic and mental realizations are below their potential realizations. This statement may lead to more problems than it solves. However, it will soon be clear why we are rejecting the narrow concept of violence - according to which violence is somatic incapacitation, or deprivation of health, alone (with killing as the extreme form), at the hands of an actor who intends this to be the consequence. If this were all violence is about, and peace is seen as its negation, then too little is rejected when peace is held up as an ideal. Highly unacceptable social orders would still be compatible with peace. Hence, an

extended concept of violence is indispensable but that concept should be a logical extension, not merely a list of undesirables.<sup>211</sup>

Violence is here defined as the cause of the difference between the potential and the actual, between what could have been and what is. Violence is that which increases the distance between the potential and the actual, and that which impedes the decrease of this distance. Thus, if a person died from tuberculosis in the eighteenth century it would be hard to conceive of this as violence since it might have been quite unavoidable, but if he dies from it today, despite all the medical resources in the world, then violence is present according to our definition...In other words, when the potential is higher than the actual [it] is by definition avoidable and when it is avoidable, then violence is present.<sup>212</sup>

The fourth distinction to be made and the most important one is on the subject side: whether or not there is a subject (person) who acts. Again it may be asked: can we talk about violence when nobody is committing direct violence, is acting? This would also be a case of what is referred to above as truncated violence, but again highly meaningful. We shall refer to the type of violence where there is an actor that commits the violence as personal or direct, and to violence where there is no such actor as structural or indirect. In both cases individuals may be killed or mutilated, hit or hurt in both senses of these words, and manipulated by means of stick or carrot strategies. But whereas in the first case these consequences can be traced back to concrete persons as actors, in the second case this is no longer meaningful. There may not be any person who directly harms another person in the structure. The violence is built into the structure and shows up as unequal power and consequently as un- equal life chances.<sup>213</sup>

Rubenstein is in agreement with this expanded conception of *violence*, reserving a place on the list of violent states of affairs for those states of affairs in which the violence is a product not of a single moral actor but rather of systems, distributions of resources, and social structures:

The fundamental idea animating the study is that certain violent conflicts are not only the result of misunderstandings, prejudice, power-lust, or some other manifestation of evil intent but are also the regular products of social systems that reproduce them as part of their normal operation. These systems, like the prison system..., tend to be elite-dominated, inequitable, and exploitative.<sup>214</sup>

... not only do structured systems fail to produce peace, they succeed very well in producing violence. Violent social conflicts need not be the result of system

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<sup>211</sup> Galtung, "Violence, Peace," 168.

<sup>212</sup> Galtung, "Violence, Peace," 168-169.

<sup>213</sup> Galtung, "Violence, Peace," 170-171.

<sup>214</sup> Rubenstein, *Structural Conflicts*, 3.

dysfunction. Depending upon the type of structure in play and other factors we will shortly discuss, they may be entirely 'functional.'<sup>215</sup>

Structural violence, [Galtung] stated, is force or influence exerted in accordance with patterned social arrangements that prevent people from realizing their human potential and satisfying basic developmental needs... If I withhold food from you, intending to starve you to death, that is direct violence. If the system of food production delivers food only to those who can afford to pay for it, and you starve because you can't afford the price, that violence is structural.<sup>216</sup>

There may not be any person who directly harms another person in the structure. The violence is built into the structure and shows up as unequal power and consequently as unequal life chances. Resources are unevenly distributed, as when income distributions are heavily skewed, literacy/education unevenly distributed, medical services existent in some districts and for some groups only, and so on. Above all the power to decide over the distribution of resources is unevenly distributed. The situation is aggravated further if the persons low on income are also low in education, low on health, and low on power - as is frequently the case because these rank dimensions tend to be heavily correlated due to the way they are tied together in the social structure.<sup>217</sup>

Thus, when one husband beats his wife there is a clear case of personal violence, but when one million husbands keep one million wives in ignorance there is structural violence. Correspondingly, in a society where life expectancy is twice as high in the upper as in the lower classes, violence is exercised even if there are no concrete actors one can point to directly attacking others, as when one person kills another.<sup>218</sup>

According to Rubenstein, a *structural injustice* is any unjust social arrangement—or any unjust system, institution, or policy—that *causes* these deficits of mental or somatic realizations.

Here, Rubenstein conceives of justice and injustice in terms of *social arrangement*—a conceptualization that is similar to the broader Wolterstorffian model of justice as being ultimately reducible to talk of normatively binding social relations, and with Anderson's relational theory of inequality. Across these views, the relevant object of consideration is the socio-moral *relation* that obtains between rights-holders (Wolterstorff), the systems that facilitate or restrict those relations or that themselves cause harm (Rubenstein), and the patterned distributions of resources inside of those systems and across those interpersonal relations (Anderson). The

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<sup>215</sup> Rubenstein, *Structural Conflicts*, 32.

<sup>216</sup> Rubenstein, *Structural Conflicts*, 54.

<sup>217</sup> Rubenstein, *Structural Conflicts*, 171.

<sup>218</sup> Rubenstein, *Structural Conflicts*, 171.



justice or injustice of a state of affairs is a matter of how wrongs or goods accrue to individuals in virtue of their situation with respect to other individuals and to the systems in which they live, and each of these various views addresses that fundamental claim from a different angle.

For the peace theorist, peace is *intrinsically social*, and for the Wolterstorffian theorist justice is *intrinsically social*, and for Anderson justice is a matter of how advantage and disadvantage are distributed *in virtue of the structure of society*—all are matters of a rights-holder's relations to other rights-holders and to the social structure in which the rights-holder finds himself or herself, and how those relations accrue in the form of well-being, advantage, or violence.

Rubenstein and Galtung (and I) offer a reformed definition of *violence*—they characterize many states of affairs as violent that would never be considered “violent” in common parlance. They do so because the narrower concept of violence—directly violent encounters between two individuals—fails to provide grounds for saying that there is something *wrong* with certain sub-optimal states of affairs, and fails to make such states of affairs evaluable in the terms of moral responsibility and justice. The gender pay gap does not look like *war*, but it is a form of harm and there is something wrong with it; hate mail does not look like a *mugging*, but it is a form of harm and there is something wrong with it. For my part, my use of this expanded notion of violence, *à la* Galtung, is an attempt both to provide a unified analysis of the various types of sub-optimal states of affairs there are and to characterize what, exactly, is *wrong* with any instance of violence: that in a given suboptimal state of affairs there is a deficit of mental and somatic realizations (some deficits being far larger than others). Here, I am not necessarily advocating for a legal redefinition of *violence*; rather, I find this more expansive notion of violence to be conceptually helpful.

But the reader may still be concerned: *Doesn't this expanded definition of violence permit too many legitimate accusations of violence?* That is, perhaps expanding the notion of

violence to apply to states of affairs in which there is no applicable moral actor goes a bridge too far. Coady takes Galtung to task:

First, let us look briefly at the formulation of his definition, which has some rather curious features. It seems to follow from it that a young child is engaged in violence if its expression of its needs and desires is such that it makes its mother and/or father very tired, even if it is not in any ordinary sense “a violent child” or engaged in violent actions. Furthermore, I will be engaged in violence if, at your request, I give you a sleeping pill that will reduce your actual somatic and mental realisations well below their potential, at least for some hours. Certainly some emendation is called for, and it may be possible to produce a version of the definition that will meet these difficulties (the changing of “influenced” to “influenced against their will” might do the job, but at the cost of making it impossible to act violently toward someone at their request, and that doesn’t seem to be impossible, just unusual).<sup>219</sup>

In defense of Galtung’s expanded definition of violence, I will first offer some clarifying thoughts so as to diffuse one set of accusations against his view, and then I will propose a revision of Galtung’s view in answer to Coady’s insights.<sup>220</sup>

First, note that Galtung’s definition of violence and the analyses of states of affairs that it makes possible are both descriptive and normative. It is descriptive in that it allows for analyses of the various causes of deficits of realizations and it is normative in that it offers that we ought to work to resolve the avoidable deficits. Definitionally, *avoidable* deficits are instances of violence, but *unavoidable* deficits are not; one is free to then draw conclusions about what one

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<sup>219</sup> Coady, *Political Violence*, 7.

<sup>220</sup> As I’ve said, Galtung’s notion of violence and use of the word “violence” deviates from standard usage and conception. For Galtung, someone who was never trained to sing, but who could have been a Broadway star were they trained to sing, instantiates a deficit of mental and somatic realizations, and so violence. But you and I would never call that *violence* in ordinary discourse—doing so would seem to dilute the word of its moral significance. Galtung has named “violence” any such deficit; so we should acknowledge that the working concept *violence* above is not what we standardly employ when we say such things as “he was violent.” Galtung’s notion of violence applies far more widely than the standard use.

Note, though, that standard usage “violence” concepts and language can be ambiguous, too (words like “harm” and “offense”). None of this is intended to be a linguistic trick; I am not attempting to over-populate the set of “violent” states of affairs with states of affairs that have been mischaracterized as “violent.” The persuasive redefinition of the “violence” concept, rather, is intended to show that we can understand in exactly the same terms *what has gone wrong* in violent states of affairs—from hunger, to lead water pipes, to domestic terrorism, to kids who miss a fulfilling career opportunity because their school doesn’t have a Drama department. These states of affairs are drastically different, but each of them is characterizable in terms of deficits of mental and somatic realizations; however, each of them is not necessarily, in turn, appropriately termed an “injustice.”

ought or ought not to do in light of avoidable deficits, given widely shared commitments regarding our obligations to act to prevent *avoidable bad states of affairs* and so forth. But Galtung's definition of violence—a real gap between potential and actual mental and somatic realizations—does not come couched necessarily in agent-caused terms; that is, it makes an analysis of states of affairs in terms of violence possible even void of any action or intention of any particular moral actor, and it allows for the possibility of violence that cannot be laid at the feet of any particular moral actor. I raise all of this in defense of the concept of *structural violence*. Without this expanded concept of violence, we simply have no way to characterize in moral terms the full set of harms suffered by moral objects (like those harms caused or instantiated by systems, distributions of resources, or structures and institutions); with this expanded concept of violence, we can offer a unified account of all the various harms that there are.

But I also raise all of this so as to address Coady's second objection above (and other objections of that sort)—objections to Galtung's notion of violence from the problem of consent. One of Coady's problems with Galtung's definition is that (he thinks) such things as self-harm or consensual drugging would be considered *violence* under Galtung's view and Coady's intuition is apparently that if I have asked Coady to drug me and he does, then Coady ought not to be faulted for acting violently toward me. I share Coady's concern, generally, that Galtung's definition is silent about the problem of consent and the willful receipt of harm, but this objection of Coady's does not undermine Galtung's definition. I take the ground: Coady is simply correct that, under Galtung's definition, states of affair in which there is self-harm or consensual drugging should be characterized as violent, because in such cases there is an avoidable gap between the potential and actual realizations.

This is not necessarily a problem for Galtung, because *that is Galtung's project*. He has provided a definition of violence that allows for analyses of states of affairs in terms of violence that are neutral to the agent's or object's consent, intentions, or motivations; in the above, he

has not entered into a discourse with the legal community. I think we can say here: though an agent's consent is salient in legal evaluations of states of affairs and would, for instance, get a "drugger" off the hook (legally speaking), the state of affairs that we have referred to here as "consensual drugging" should still appropriately be referred to as "violent" under the expanded concept of violence that we have been using. In legal practice, the consent of the drugged makes for one set of evaluations; but when evaluating a state of affairs in terms of whether or not there is an avoidable deficit of mental or somatic realizations, at least some cases of consensual drugging are appropriately called *violent*. There are two potential cross-pressures here: the first being that it is possible that our legal principles regarding consensual harm (even though widely accepted) are wrong, too permissive, and fail to track with the relevant moral principle (*ceteris paribus*, avoidable deficits are bad) and the second being that it is possible that the legal conversation about consensual harm and the moral conversation about consensual harm are two very different conversations that need to be teased apart.

Take a different example: often, chemotherapy is necessary and warranted, though it causes all sorts of deficits of mental and somatic realizations. Surely, we do not want doctors to never be permitted to cause a deficit of mental and somatic realizations (presuming they have some reason to believe that causing a particular deficit, as in chemotherapy, will heal or preserve life). Chemotherapy is arguably violence, under Galtung's definition of violence as avoidable deficits of mental and somatic realizations, and chemotherapy is only a counterexample to Galtung's project if we are first committed to some version of *we ought always to end or prevent avoidable deficits of mental and somatic realizations (as conceived of by Galtung) no matter what*. If we reject that last clause—*no matter what*—we can neutralize Coady's concern. We should take the doctor's expert administration of chemotherapy for what it is: not a mere application of harm, but rather a regimen of treatments designed to preserve that patient's life and well-being.

Coady's more pressing problem for Galtung, however, is the problem of suboptimal states of affairs that, surely (according to Coady), ought not to be considered violence. This is illustrated in part by the chemotherapy example above. There are two ways to proceed here. One is for Galtung (or someone writing in his defense) to simply bite the bullet and grant that, yes, a baby who keeps his parents up at night is a violent actor, or at the very least that those resulting states of affairs are *violent*. We could insist that, yes, the loud baby instantiates violence because the loud baby is causing avoidable deficits of mental and somatic realizations. There is no problem, in principle, with going this route; that is, one can go this route and keep Galtung's framework intact. The result would just be counterintuitive returns in ordinary language (*loud babies victimizing their parents*, for example; or, the *violent reality of young parents*).

I am in agreement with Coady and depart from Galtung, here. What is needed in these sorts of cases is a conceptual space that allows for suboptimal states of affairs that are not to be characterized *in the very same terms* as such states of affairs as unjust war, torture, verbal harassment, etc. So I share Coady's intuition that if a loud baby is *violent* in the very same sense and for the very same reasons that a car bomb is *violent*, then we have a problem. So, I suggest the creation of a conceptual space that allows for deficits of mental and somatic realizations that ought not to be characterized in terms of *violence*. So, let us carve out a space for states of affairs characterized by deficits of mental and somatic realizations—arduous medical treatments, studying intensively for exams or writing dissertations, inconsolable infants—that ought not to be termed *violent*. And the difference will be a difference not in the degree of the deficit of realizations, but rather a difference in the kind of the deficit of realizations. We could simply create classes of protected deficits of realizations to which the label *violence* would simply fail to apply—acceptable deficits associated with medical treatment, with difficult tasks like studying, with the duties of parenthood, and so on. And in all other cases, Galtung's definition would apply.

The only alternative is to grant that Galtung's definition applies to cases like the inconsolable child and to characterize such states of affairs as *violent*; I prefer the route characterized above, but like I have said in principle I see no issue for Galtung were he to simply bite the bullet. That is, if I can characterize a society as *violent* (by which I just mean that that society is characterized by various deficits of mental and somatic realizations) without laying moral responsibility at any one agent's feet, then surely I can characterize the home life of the young parents raising a child as *violent* (by which I just mean that that family is experiencing various deficits of mental and somatic realizations) without laying moral responsibility at the baby's feet. After all, it is the deficit of realizations that we can all agree on, and if we can accept the deficits without terming babies "violent," perhaps there is no real problem. And perhaps this ability to characterize states of affairs as violent in an agent-neutral way is enough to avoid Coady's concerns about how counter-intuitive it would be to judge that an infant is being violent.

Rubenstein holds that direct and structural violence arise from the seedbed of *structural injustice*—those unjust, inequitable, and exploitative social relations that generate violence either intentionally or unintentionally. Rubenstein's point is that when you place normally functioning individuals into a set of sufficiently exploitative, abusive, or unfair structural arrangements, the only way to survive or overcome which is through violence, then the predictable and reliable outcome is violence; and the abusive and exploitative relations themselves are violent. With that established, the peace-theorist's only reasonable recourse to action in their effort to eradicate violence is to address the violence-manufacturing structures into which people are placed. This understanding of the intersection of *structure* and *violence*, in conjunction with a Wolterstorffian account of the *morally legitimate claims of rights-holders*, allows us to conceive of the agents in those systems as not only being the victims of structurally unjust arrangements, but also as their having morally legitimate claims against their being the victims of such systems. Correcting structural injustice and violence will take an accurate

conceptualization of the agency and moral responsibility of those who constitute the unjust systems and institutions, those who benefit from them, and those who have the power or liberty to change the systems and institutions as they currently stand. Later, when it comes to questions of race reparations for Black America, we will need to answer questions about the claims of Black Americans against the State and other institutions that are generated by past and present structural violence.

Galtung's notion of violence deviates from standard use to such an extent that I emphasize here its conceptual, rather than political, role in the account I am building. Galtung's definition provides a way of distinguishing the ideal from the non-ideal, and one further way of characterizing what has gone wrong in cases of injustice or violations of rights. In my account, rights are claims against others to certain life-goods—certain goods or ways of being treated. “Violence,” here, refers to avoidable deficits of mental and somatic realizations; “life-goods,” here, refers to those goods and ways of being treated that maximize well-being and mental and somatic realizations. Definitionally *à la* Galtung, any avoidable deficit of mental or somatic realization is “violent,” although you and I would never refer to some such deficits as an instance of violence in ordinary language. Some deficits of mental or somatic realizations constitute a violation of rights, some deficits of mental or somatic realizations are caused by violations of rights, and some proceed from natural occurrences and are not evaluable in the terms of justice. I maintain Galtung's non-standard utilization of “violence” in my account for its usefulness in identifying and characterizing the full suite of suboptimal states of affairs. We could re-name Galtung's violence concept something like “Bernard,” so as to distinguish it lexically from the standardly used concept *violence*, but I choose to keep Galtung's conceptual space intact. As I have said above, I endorse Galtung's expansive use of the term *violence* in part because it simplifies the terrain and in part because it unifies (albeit to a limited extent) the terrain.

Take the difference between forcibly kidnapping someone and holding them hostage, and merely finding someone in a house and then locking the door so they cannot escape.<sup>221</sup> And take Galtung's example: the difference between directly stealing food from another and acting to make it impossible for others to obtain food. I grant that these cases are radically different, both legally and morally. But each of these cases is evaluable *in just the same way* in Galtung's terms of violence—in terms of avoidable deficits of mental and somatic realizations that we ought to mitigate. Each of these examples is wrong and condemnable for its own reasons, whether or not one accepts Galtung's expanded definition of violence. Calling them all instances of "violence," and explaining that concept in terms of avoidable deficits of realizations, allows us to conceive of these states of affairs as all being comparable along the same dimension, in addition to their all being wrong or bad or illegal *for some reason or other*. The reader may still insist, "But surely there are avoidable deficits of mental and somatic realizations that *are not violent*!" And my only response to the reader at this point is to say, "Yes. Above I suggested the creation of a class of *protected* deficits. But you and I are still using the word 'violent' differently—I am trying to convince you that it is helpful to judge each avoidable deficit of mental and somatic realizations to be violent, and I am trying to allay your concerns by pointing out that violence comes in degrees. In my view, hate speech and capital murder are neither equally bad nor equally violent, but they are both bad and they are both violent."

#### E. When the State Should Intervene

In what follows, I rely on the work of Galtung and Rubenstein so as to have operable concepts in place. To fit Galtung's concepts into my broader work on worth, rights, and justice, let's establish some definitional stipulations. *Peace* and *justice* typically characterize the very same sets of states of affairs—those states of affairs in which rights-holders are not being wronged and in which they are not subject to violence.<sup>222</sup> This establishes an important relation

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<sup>221</sup> This example offered by Professor Jacob Adler in a round of comments.

<sup>222</sup> Violence, that is, *à la* Galtung.



between “being wronged” and “deficits of somatic and mental realizations.” But this relation is not an identity; it is more nuanced.

For instance, one’s right being violated in some domain and just any deficit of somatic and mental realizations within that domain are not *identical* states of affairs. Consider: hurricanes, for example, lead to deficits of somatic and mental realizations, but surely hurricanes cannot accurately be characterized as *wronging* hurricane victims; further, the violation of one’s privacy rights, for instance, does not necessarily instantiate some harm to one’s mental or somatic well-being (as in a case where one’s privacy is violated, but one has no idea such a violation has taken place), but such a violation is surely a *wrong*. But I do intend the terms “peace” and “justice” to *ordinarily* characterize the same states of affairs, and the term “violence” to be *ordinarily* coextensive with the term “injustice.” “Direct violence” refers to those states of affairs in which rights-holders are harmed and/or wronged directly by other rights-holders, and “structural violence” refers to those states of affairs in which the violence experienced by rights-holders is caused by system or structure or institution or social arrangement. The situations in which nobody is wronged and in which each rights-holder gets that to which they have morally legitimate claim *just are* the situations in which “somatic and mental realizations” approach their potential (barring natural, non-moral factors that might put an upper bound on one’s mental and somatic realizations, relative to their potential realizations)—these we should call *just* states of affairs and *peaceful* states of affairs. Though I take those terms to generally pick out the same states of affairs, not all states of affairs characterizable in the terms of *violence* will also be characterizable in the terms of *injustice* (take some flood that caused deficits but did not *wrong* anybody). There will be deficits of mental and somatic realizations that are *unavoidable* and so do not amount to *violence à la* Galtung (for instance, hunger that is not avoidable *in a particular socio-moral context*) and there will be instances of *wrongs* not associated with any deficit of realizations whatsoever (for instance, as when a hacker steals your personal information unbeknownst to you) and there will be instances of

*wrongs* that are associated with unavoidable deficits of realizations (for instance, a ruler whose people are hungry and who could act to end a famine sometime in the near future but does not so act for corrupt reasons). Most instances of unwarranted physical violence (direct violence) will be instances of *wrongs* that instantiate *avoidable* deficits of mental and somatic realizations.

All of this is fertile ground for counterexamples. What of the example above, that of an arduous medical treatment—is it violent, is it unjust? What of the inconsolable baby—is it violent, is it acting unjustly? What of a professional mixed martial arts fighter who gets beat up for a living—does she experience violence or injustice? And what of the society where one gender or caste is assigned an inferior role but then gladly accepts that assignment—are they victims of violence or injustice? The simple answer is that these are examples of cases where the terms *violence* and *injustice* are not co-extensive. Each, to be sure, is an example of a deficit of mental or somatic realizations and, under Galtung's original definition, constitutes violence or instantiates a violent state of affairs. However, none of those listed is obviously a case of injustice—a case of someone's right being withheld. So here, we have potential exemplars of the kinds of cases in which our notions *peace* and *justice* may be teased apart. The MMA fighter is physically wounded, yet in entering the octagon she has waived her claims to bodily safety; the young father is emotionally depleted, yet in taking on the duties of fatherhood he has waived his claims to a full night's sleep. There is a clear and avoidable deficit, yet no clear violation of some right. Above, I suggested a revision of Galtung's definition of violence so as to carve out a conceptual space for suboptimal states of affairs that it would be bizarre to consider *violent*. So in such cases as these, we have two options: hold strictly to Galtung's formulation and call these instances of violence but not instances of injustice (on grounds that they constitute no violation of a right) or accept that at least some of these cases might be the "protected" kind of cases in the sense that they are suboptimal states of affairs but are not appropriately termed "violent."

Take a different sort of consideration—that of an ideal realization that exceeds what is needed for flourishing. For example, consider the wealth of Jeff Bezos and consider your failure to attain to his measure of wealth; imagine also that, although you are not as rich as Jeff Bezos, you are happy and you neither need nor want anything in addition to what you already have. So, it is *possible* for you to be richer, but you are *flourishing*. In such a case, I take it that it would be incorrect to say that you are experiencing *violence*, as conceived of by Galtung. Certainly, you could have a larger quantity of money; but, as just established, you also experience flourishing. If we are to measure or judge mental and somatic realizations according to one's net worth, then it is in principle impossible to do anything but experience violence—because one can always possibly have one more dollar. Instead, I offer that we should say: a case in which you do not have as much money as Jeff Bezos, but in which you know real flourishing and your current amount of money is no barrier to knowing more flourishing, the deficit of mental or somatic realizations that you experience (if any) is not attributable to the fact that you have fewer dollars than Jeff Bezos. You may be experiencing violence for some reason other than your current net worth; indeed, it is likely that Jeff Bezos, even with his fortune, experiences violence at times. But here, I contend that, assuming you have enough money to meet your needs and realize flourishing, the mere fact that you have less money than Jeff Bezos (that is, less money than it is possible to have) fails to constitute a deficit of mental and somatic realizations.

It is incorrect to say, in my account, that in the justly structured society there will be no injustice. Rather, in the justly structured society there will be only those instances of injustice *upon the discovery of which the State or other rights-holders shall move to resolve them* and none of the injustices that obtain shall be committed by the State itself. In this section I add to my conceptualization of the justly structured society that violence-dimension, drawing on Galtung: any deficit of mental or somatic realizations that shall be permitted to persist in a justly

structured society is of an *unavoidable* variety and the standards *avoidable* and *unavoidable* are to be indexed to a particular socio-moral context.

Important to note here: the avoidability or unavoidability of any particular deficit of mental or somatic realizations must be judged in terms of the ability of agents and states *in that socio-moral context* to end, prevent, correct, or make compensation for each such instance of that deficit. Take, for example, a *prima facie avoidable* deficit that is extremely minor: a child's missing out on bedtime reading on Thursdays because his parent works on Thursday nights. The deficit is *prima facie avoidable* because we could imagine the government sending a nanny to the child's bedroom to read bedtime stories on Thursdays, but the deficit is not *ultima facie avoidable*, because the government could not possibly resolve each such instance—such minor deficits play out millions of times over on any given day (and most of us would not want government-mandated bedtime nannies sent to our homes, regardless). So a particular deficit is avoidable only if rights-holders or the State are *capable* of bringing it to an end; a justly structured society is only on the hook for those deficits of realizations that it is capable of addressing.

So, the *avoidability or unavoidability* of a deficit of mental or somatic realizations is determined by socio-moral context and the distinction between the two is a matter of the ability of rights-holders (and other moral actors, like states) to alleviate the deficits. Take the socio-moral context we examined earlier, that of famine: in a famine, the deficit of mental or somatic realizations caused by hunger is *unavoidable*. The deficit cannot be avoided in a case of intense famine and in such a case there can be no moral prerogative of rights-holders in that socio-moral context to alleviate the suffering; that would place a moral obligation on rights-holders that cannot be met. However, in a time of relative abundance, the deficits of mental and somatic realizations characterized by hunger are *avoidable*; the rights-holders in such socio-moral contexts *do* have morally legitimate claims to their not suffering from hunger and there are moral obligations on other rights-holders to meet those who are suffering at their point of need. In both

socio-moral contexts the violence is *bad*, and the suffering is real; however, claims obtain in the one context but not the other, and the deficit is *avoidable* in the one context but not the other.

What makes a society unjustly structured is either that:

- i. the State itself disrespects the worth of rights-holders, or
- ii. the society's structure is conducive to inevitably exploitative social arrangements,  
or
- iii. the society permits (or causes) *avoidable* deficits of mental or somatic  
realizations, or
- iv. the society fails to meet the claims to corrective and compensatory justice of  
those who have been wronged.

In throwing aside the ideally just society as an unattainable goal and embracing the justly structured society as our proper practical aim, and in granting that rights-holders have legitimate claim to certain life-goods, the need arises for a way to determine the appropriate boundaries of state intervention in rights-holders' lives.<sup>223</sup> In aiming for the justly structured society and not the ideal *justice*, and in opting for a society in which wrongs are addressed but not plausibly eradicated altogether, I open the gates to hard questions about appropriate State intervention in the private lives of rights-holders (intervention that is aimed at alleviating violence and wrongs).

We need upper and lower boundaries for determining such State intervention. In the interest of distinguishing those cases of violence and injustice in which the State is required to intervene from those cases in which the State is not required to intervene or is required *not* to intervene, I offer simply that in a justly structured society *unavoidable* deficits of mental or

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<sup>223</sup> In *The Idea of Justice*, Amartya Sen breaks with traditional attempts to define "the just society," flipping the discourse over. Instead of arguing from ideal principles, he notes the seeming innateness of certain judgments of ours that *particular actions* are unjust. That is, even as children we agree on the injustice of particular injustices more than we agree on any ideal theory—so we should start with those particular consensus injustices and move toward a more just society one step at a time.

Ultimately, Sen (2009) dispenses with the idea of a maximally just society. I do not. I do believe that the ideally just society is unattainable, but the practice of characterizing the ideally just society illustrates what has gone wrong in any given society, and it provides us with a target to aspire toward

See Sen, *Idea of Justice* and also note 206 above.

somatic realizations (whether caused directly or structurally) may be permitted to persist as long as they are not the result of some *wrong*. (Deficits of mental and somatic realizations that result from some wrong will be necessarily addressed by a justly structured society in that society's addressing of the wrong.) And as established earlier, standards of *avoidable* and *unavoidable* deficits of somatic and mental realizations are relative to moral, historical, and technological context. In conjunction with a consideration of rights-holders' morally legitimate claims, these notions of avoidable and unavoidable deficits of mental and somatic realizations determine the grounds of morally legitimate State intervention.

In a justly structured society, the State fulfills the morally legitimate claims of rights-holders against the State, there are institutions and laws in place for the State (or other pro-social institutions) to address the violations of the rights of members of that State by agents other than the State, and the State enforces the claims of rights-holders to corrective and compensatory justice as wrongs arise. So, in the justly structured society, there will be wrongs, but the State will not be the agent committing those wrongs and will be dutybound to redressing the wrongs that are committed. But even with those conditions met, in the justly structured society we should expect that commission of wrongs (and potentially very many wrongs) to persist, and that there will be resulting deficits of mental and somatic realizations (at least in some cases). Even if the State itself is not rampantly violating peoples' rights, and even if the State has a robust justice system empowered to correct wrongs, in the justly structured society rights will be violated and deficits of realizations will obtain.

And it is in that non-ideal world that difficult questions arise: *Given that there will be wrongs and suffering even in the justly structured society, what do we mean by calling it justly-structured, and at what point must the State insert itself into the private affairs of citizens in order to alleviate deficits?* It is in the pursuit of providing an answer to that question that I take Galtung's talk of avoidable and unavoidable "deficits" to be helpful.

And in each socio-moral context, the lines between *acceptable* and *unacceptable* *violence* will need to be determined. Mill's harm principle is worth mentioning here.<sup>224</sup> I take it that rights-holders have rights to not be harmed by other rights-holders—that each instance of such a case is an injustice that ought to be either prevented or corrected. So I agree, generally, with Mill's harm principle—that the state may restrict a rights-holder's liberty in order to prevent their harming somebody else without warrant. But in exploring the morally legitimate bounds of state intervention, my view also needs to be sensitive to other forms of deficits that there are: violence that was not the result of the activity of rights-holders, for instance. The state cannot be restricted in its intervention to only those instances of violence that arise from the action or inaction of rights-holders; often, both avoidable and unavoidable deficits arise from natural disaster or plague, and the justly-structured state will alleviate the avoidable varieties (as in, the mass preventable suffering that resulted in the wake of Hurricane Katrina in 2005, or the mass preventable suffering that resulted from the uncontained global spread of COVID-19 in 2020).

So, we can conceive of the justly structured society as being arranged in such a way that the State has grounds for intervention in all cases of *injustice*; and the State (or individuals) shall intervene when the deficit of somatic and mental realizations becomes *avoidable* (accept in special cases), whether or not that deficit is associated with some wrong; and the State must answer every legitimate claim against it to corrective and compensatory justice for past and present wrongs (direct or structural). And, furthermore, the persistence of every *avoidable* deficit of mental and somatic realizations (assuming the deficit is resolvable) itself constitutes a *wrong*. From socio-moral context to socio-moral context, the magnitude of the deficits of mental and somatic realizations that there are will be evaluated differently. In many socio-moral contexts (like that of famine), though, at least some cases of suffering and harm will be acceptable, because that there can be no resolution to those cases of suffering and harm makes it impossible for a rights-holder to be morally obligated to resolve them.

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<sup>224</sup> Mill, *On Liberty*.

In a justly structured society, there will inevitably be deficits of mental and somatic realizations, some as a product of violations of rights (as in, murder) and some not (as in, economic collapse); and in many moral contexts the State cannot reasonably be expected or even desired to intervene in some of these deficits (as in, a case where a child goes without bedtime reading on Thursdays because their parent is at work). But we should expect the State to take action to correct some wrong or some bit of suffering in cases where the deficit becomes *avoidable* and the deficit is clearly associated with some wrong (as in, the childhood hunger that results from generational poverty). This all implies that, in the justly structured society, there will be *unavoidable* deficits of mental and somatic realization that are permitted to persist. I accept that implication and grant that there will be *unavoidable* deficits of mental and somatic realizations in the justly structured society. In the justly structured society there will also be many instances of *avoidable* deficits of mental and somatic realizations that are permitted to persist, so long as they constitute no violation of a human right; such deficits will be minor.

So, much as rights are highly contextualized socio-moral entities, how we characterize deficits of mental and somatic mental realizations (in terms of their avoidability or unavoidability) is highly contextualized. It is the case that some instances of unavoidable deficits are also instances of a situation in which a right that normally obtains no longer obtains in the present context; in times of famine, for instance, one's rights to food do not obtain due to the lack of availability of food. *In that particular socio-moral context*, the morally legitimate claim to food does not obtain, though there may well be a suite of other rights: claims against rulers to their working to alleviate the situation, for example, or claims against global powers to regulate their carbon emissions and curb the effects of climate change. In such a case, the deficit that starvation causes to an individual must be conceived of as unavoidable, because in times of intense famine there is nothing that can be done by rights-holders or the State to alleviate the mass suffering, and the inevitability of that suffering leaves that state of affairs hardly condemnable in the terms of *injustice*.



In some moral contexts, many deficits are within the bounds of a moral expectation that they be addressed (either by moral agents or the State), but other deficits are *not*. And in other cases, there is some deficit of mental and somatic realizations that is simply not evaluable in terms of justice (as in the suffering caused by natural disaster). In the natural disaster-borne suffering case, it might well obtain that the state and other rights-holders fail to alleviate the suffering according to their duties to do so, in which case injustice would obtain in tandem with avoidable mental and somatic deficits. A justly structured society, indexed to the particular moral context it finds itself in, will surely address the most egregious examples of suffering, but may be unable to address others (for lack of resources, or the requisite technology, etc.). In a justly structured society there will be different undesirable things happening all at once, some of which will be the object of moral condemnation but others of which should be conceived of as *acceptable in that context*.

This picture I am offering is complicated. Here is the range of types of states of affairs we are potentially presented with in the justly structured society:

- i. some local state of affairs could be characterizable as both just and peaceful,
- ii. some right could be violated leading to some (avoidable or unavoidable) deficit of mental and somatic realizations,
- iii. some right could be violated in such a way that it leads to *no* deficit of mental and somatic realizations,
- iv. some deficit of mental and somatic realizations could be actualized in such a way that its persistence constitutes a *wrong* and the State or individuals are duty-bound to address it, and
- v. some *avoidable* deficit of mental and somatic realizations could obtain independent of any *wrong*.

We need a decision procedure for distinguishing those cases in which the State is duty-bound to intervene in a case of violence or injustice from those cases in which the State is not duty-bound to intervene.

I propose this *Principle of Burden (PB)* for such cases in which it is unclear whether or not the State ought to insert itself:

- PB:* In any case in which the State is capable of rectifying some instance of violence (whether direct or structural), the State is duty-bound to do so unless:
- i. doing so violates the morally legitimate claims of some *bystander* rights-holder in that context (*as in, were meeting one rights-holder's claim absolute protection from gun violence to require the confiscation of every gun in circulation*), or
  - ii. doing so would render the State incapable of addressing more egregious cases of violence or some other wrong (*as in, were meeting one rights-holder's claim to having updated textbooks in their classroom to require emptying the city's emergency management budget*), or
  - iii. there is some other plausible morally legitimate way of resolving the violence that does not require State intervention (*as in, were a local church willing and able to feed and house the homeless community*), or
  - iv. independent of conditions i–iii, the deficit of somatic and mental realizations is *unavoidable* relative to the particular socio-moral context.

Then, once it is determined that State intervention is warranted in a given case, the morally legitimate bounds of intervention must be determined. In a liberal democracy like ours, laws and the courts are the most obvious candidates for who gets to determine the morally legitimate bounds of State intervention, but it should be clear to everyone that laws and the courts are

imperfect and have frequently fallen on the side of injustice until dragged forward by moral progress.<sup>225</sup>

According to (i), the State should not be conceived of as being morally obligated to violate some bystander rights-holder's right (a rights-holder who is *not* responsible for the violence in question) in order to resolve some avoidable deficit, even assuming the state's only possible means of resolution of the avoidable deficit entails disrespecting that other rights-holder's worth. Innocents shouldn't be treated as moral collateral. But conceptually, there will be some cases where the State's duty to intervene to end avoidable deficits will cross with some right of the bystander rights-holder and in those cases it will need to be determined if the right of the bystander rights-holder actually stands in that socio-moral context such that the State mustn't so act, or if it is a socio-moral context in which there is no such contradiction of rights because *in that socio-moral context* the bystander rights-holder has no such right.

In trying to carve out the bounds of morally legitimate State intervention, I envision the State as being a moral actor of last resort. The State is hardly the only moral actor responsible for righting some of the wrongs that there are, but in many cases it is the only moral actor with the resources required for righting the wrong in question. So, in my view, the State is let off the hook in those cases where a pro-social religious organization, for example, could be conceivably responsible for righting some wrong that there is. Rights-holders would still have claims against the State to its correcting the avoidable deficits there are *in the case that some other entity does not resolve it* and in many cases the State is the *only* entity capable of answering the claim. And regarding (iv), in cases of *avoidable deficits*, state intervention is required, unless the only means of state intervention possible entails the violation of some bystander rights-holder's right, unless the state's actions would cause some other egregious wrong, and unless some other pro-social institution would like to resolve the avoidable deficit. If the violence in question is *unavoidable*, the State is not obligated to act. I will simply emphasize

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<sup>225</sup> Hagler, "Supreme Court Decisions."

here: there will be instances of preventable deficits of mental and somatic realizations that are so minor that the State is not obligated to act to resolve them.

#### F. Structure and Past Wrongs

So, individuals can be wronged by other individuals and by institutions and the State, and similarly violence can be caused by both individuals and structure. Important to note is that social structure and society itself are historical entities; they are constituted by social arrangements that are either just or unjust and these arrangements are the products of a long history and a causal chain of policies, actions, and distributions of resources. At any point on the timeline, there are states of affairs that are analyzable in terms of their being *just* or *peaceful*. But as we attempt to answer the second core question that motivates this work—(Q2) *What are the requirements of justice with regard to Black Americans today, in light of historical wrongs?*—we must acknowledge the role that past wrongs play today and the reality that the social relations that obtain today (many of them inequitable) are an *accumulation* or *inheritance* or *consequence* of past wrongs, or otherwise have their etiology in a past state of affairs that is characterizable as *unjust*. Many of the institutions and social relations that obtain today that *wrong* rights-holders in the present are simply holdovers or legacies of past wrongs;<sup>226</sup> they are social arrangements that instantiated unjust relations when founded, they are social arrangements that were not changed, and as they exist currently the social arrangements instantiate unjust relations. And the requirements of *justice* and the *justly structured society* require that wrongs be righted, be they direct or structural.<sup>227</sup>

Here enters talk of reparations. In the final chapter, I will offer two tracks of race reparations that I argue should be pursued concurrently as an output of my preceding rights-first

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<sup>226</sup> For example, Ibram X. Kendi's *Stamped from the Beginning: The Definitive History of Racist Ideas in America* is a historical account of the emergence of racist ideas as justifications for power relations that politically and economically disadvantaged certain racial minorities. In his epilogue, he makes the case that it is anti-racist policies (rather than other strategies that have been employed unsuccessfully) that will make things better for victims of past and present racialized wrongs. See Kendi, *Stamped*, 503–511.

<sup>227</sup> A more thorough discussion of righting past wrongs, and the various difficulties that accompany righting past wrongs, takes place in the next chapter.

theory of justice. My claim is that those individuals who are currently (and historically) wronged, like those rights-holders who constitute Black America, have morally legitimate claim to these two varieties of reparations as a product of their inherent worth in our present socio-moral context. The beneficiaries of reparations will include those who are currently being wronged, those who can be determined to be the inheritors of the debts owed to long-dead individuals who were wronged by either another long-dead person or long-gone institutions, and living people who were wronged in the past either by people (living or not) or some institution or structural arrangement (still existing or reformed, or not). Navigating this space comes with a plethora of epistemological and historiographical difficulties and we will discuss them in the next chapter.

The first variety of reparations is the track of *direct race reparations*, whereby individuals who are wronged directly or structurally (or whose ancestors were wronged directly or structurally) are *owed* direct financial compensation. Direct race reparations looks backward and laterally, handling both past and present wrongs committed by either individuals, systems, institutions, or social arrangements; so, *direct race reparations* handles instances of both direct and structural violence, and the reparations are *direct* in the sense that compensation is made directly to individuals who are owed. The second variety of race reparations is the track of *structural race reparations*, whereby those systems, institutions, and structures that currently wrong Black Americans are reformed according to the morally legitimate claims of rights-holders.<sup>228</sup> Structural reparations looks laterally and forward and addresses rights-holders' morally legitimate claims to structural reform *today*, so as to discontinue and disrupt social arrangements that reliably and predictably wrong certain rights-holders according to factors like race or ZIP code.

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<sup>228</sup> A complete theory of justice will apply these concepts to any instance of concentrated disadvantage. I am restricting what follows to the domain of the history of American anti-Black racism.

I have distinguished between *direct race reparations* and *structural race reparations*.

Direct race reparations handle direct financial repayment for wrongs, whether those wrongs are inflicted by individuals or by structure. Structural race reparations address rights-holders' various claims to the reform of the disadvantageous or violent structure around them. So, the relevant distinction between the two varieties of reparations is not that between "violence that is direct" and "violence that is structural"; the relevant distinction is between *the kind of thing which is owed in a given case*: compensation and reform, respectively.

## Chapter 5: Morally Legitimate Claims to Race Reparations

### A. A Review and a Survey of Reparations Theory

In this final chapter, I apply my rights-first theory of justice to the race reparations discourse; but before that, here is a quick refresher of what we have done so far. In Chapter 1, I surveyed the various theories of rights on offer from across the rights literature—from Hohfeld’s quadripartite analysis of rights, to Wenar’s functionalist analysis of rights, and to the views of prominent interest theorists, will theorists, and demand theorists of rights. That chapter ended with Beitz’s praxis-first theory of rights, according to which prominent theories of human rights are inadequate to the task of international human rights theory and according to which human rights *just are* the role they play in international human rights praxis. In Chapter 2, I unpacked Wolterstorff’s rights-first theory of justice according to which human rights are the normatively binding socio-moral relations that are grounded in the human worth that is bestowed by the relevant relation of God to God’s human creatures. Justice, in Wolterstorff’s view, amounts to respect for human worth. I challenged Wolterstorff’s theistic account of rights, on grounds that it will inevitably fail to satisfy the atheist or agnostic and that it is internally inconsistent in positing alienable properties and capacities as those features of humanity that account for humans’ candidacy for right relation to God.

In Chapter 3, I offered multiple theistic and multiple non-theistic alternatives to Wolterstorff’s accounting for human moral considerability while keeping the general structure of Wolterstorff’s theory of rights and justice intact. I was sensitive to the political nature of human rights discourse and I advocated for a Rawlsian or Beitzian maneuver according to which if one is unhappy with the particular metaphysics of rights on offer, one should simply lean forward into claims that enjoy far greater consensus in the philosophical community: that for some reason or other, humans are morally considerable and have rights. In Chapter 4, I introduced Galtung and Rubenstein so as to round out my account of justice, giving it the resources needed to talk about structural justice and structural injustice. I evaluated structural violence in exactly the

same terms that I evaluated direct violence—in terms of a rights-holder’s worth being disrespected. Now, I turn to an application of the first four chapters to a particular domain of injustice—historical and contemporary American anti-Black racism.

And before presenting what my Wolterstorffian rights-first theory of justice contributes to the reparations space, I present here an overview of the predominant lines of reparations thought. In this chapter, I agree with leading reparations theorists that reparations are owed for past and present wrongs and I focus on that scope of cases pertaining to the reparations owed for anti-Black wrongs in the American historical context. The theoretical outputs of my Wolterstorffian theory will, of course, apply similarly to *any* direct or structural instance of disrespect for human worth—and not just the instances of disrespect for human worth that are characterizable as anti-Black racism.

I will advocate for two tracks of race reparations: the first track being morally legitimate claims to the direct compensation (for past or present wrongs) that is owed either to the one who was wronged or to the one who has inherited the claim to compensation and the second track being morally legitimate claims against the State and various other institutions to their reform such that concentrated racial disadvantage and structural violence are interrupted. Clearly, the two tracks differ in nature—one is straightforward compensation and the other amounts to opportunity equalization and structural reform. But I call both tracks “reparations” because they are both reparative. I will show that both are *owed* in response to the various modes of disrespect for human worth that there are and have been and I offer that these morally legitimate claims to race reparations obtain in just the same way that other rights obtain. They are the normatively binding claims of one rights-holder against the other (or against the State), supervening on human worth in just the same way and with just the same force as any other normatively binding human right.

Central to American history is the politicization and cheapening of racial wrongs; here, I seek to demonstrate that if anything can be thought to be a matter of justice, that which is owed



to Black Americans in light of past and present wrongs should be thought to be a matter of justice. My conjunction of the work of Wolterstorff, Galtung, and Rubenstein provides a space for thinking of race reparations in terms of human worth and the morally legitimate claims that supervene on that worth in light of past or present wrongs and racialized direct and structural violence.

Talk of race reparations was launched back into popular discourse in recent years with Ta-Nehisi Coates's 2014 article in *The Atlantic*, "The Case for Reparations," in which Coates profiles decades of racist housing and property policy, red-lining, predatory mortgaging and lending, etc., and their impact on wealth disparities between Black and non-Black families.<sup>229</sup> Coates traces the history of reparations-concepts through Jewish Talmudic literature, throughout the post-Civil War South, and in contemporary politics. In his article, Coates laments the failure of lawsuits following the 2007–2008 mortgage lending crisis to fully reckon with the debts owed to victims of predatory lenders and sub-prime mortgage lenders who preyed on Black Americans for profits both before and after the mortgage crisis. Legal action was taken to seek reparations from firms that used explicitly racist policies to disadvantage vulnerable Black families who did not have access to traditional lending markets, but the suits failed.

Coates's case for reparations is both principled and pragmatic. He profiles massive racialized wealth gaps that are the direct consequence of human slavery, subsequent centuries of racism, and decades of contemporary racist economic policies and he calls to the reader's attention that many of our society's intractable issues are intractable precisely because we have failed to address the matter of that which is owed to Black Americans:

Something more than moral pressure calls America to reparations. We cannot escape our history. All of our solutions to the great problems of health care, education, housing, and economic inequality are troubled by what must go unspoken. "The reason black people are so far behind now is not because of now," Clyde Ross told me. "It's because of then." In the early 2000s, Charles Ogletree went to Tulsa, Oklahoma, to meet with the survivors of the 1921 race riot that had devastated "Black Wall Street." The past was not the past to them.

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<sup>229</sup> Coates, "Case for Reparations."

“It was amazing seeing these black women and men who were crippled, blind, in wheelchairs,” Ogletree told me.<sup>230</sup>

With reference to case studies like post-WWII German reparations to Holocaust survivors and the Jewish community, Coates argues that not only do reparations serve to repair some past wrong, but they also come with positive economic benefits for both the wronged and for the community in which the wronged spends their money. Like the works of Brophy, Brooks, and Robinson, Coates treats reparations as a moral response to wrongful harm.<sup>231</sup> And for those who think race reparations are the idealist’s fiscally impractical political goal, he points to the economic stimuli that reparations lead to in other historical contexts.

Alfred Brophy describes the pro-reparations landscape as it relates to the notions of *corrective justice* and *distributive justice*:

Often, reparations programs look backward. That is, they focus on measuring past harm and correcting for it. Thus, truth commissions, apologies, and individual payments are frequently aimed at correcting for some well-defined, identifiable past harm. Other programs are forward-looking. Community-building programs, designed to promote the welfare of an entire community through such actions as funding for schools, frequently make little effort to measure past harm; recognizing that a harm occurred in the past, they are more concerned with trying to design a program to improve the lives of victims into the future. Reparations proponents’ discussions of backward-looking and forward-looking programs are similar to what is called “corrective justice,” which refers to acknowledging and repairing past harm, and to “distributive justice,” which refers to distributing property in a fair manner. In essence, corrective justice seeks to put people back in the position they would have been in, absent slavery or other racial crime. That involves answering a complex question: what position would a given person be in without slavery?<sup>232</sup>

Every reparations program is likely to look both backward and forward in certain ways. They will be backward-looking because they are justified on the basis of past harm and forward-looking because they are designed to enable a better future.<sup>233</sup>

We might think of reparations, then, as programs that are justified on the basis of past harm and that are also designed to assess and correct that harm and/or improve the lives of victims into the future.<sup>234</sup>

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<sup>230</sup> Coates, “Case for Reparations.”

<sup>231</sup> See Brophy, *Reparations*; Brooks, *Atonement and Forgiveness*; and Robinson, *The Debt*.

<sup>232</sup> Brophy, *Reparations*, 7.

<sup>233</sup> Brophy, *Reparations*, 8.

<sup>234</sup> Brophy, *Reparations*, 9.

It will be in the terms of that final block quote that I will think of race reparations: claims to reparations as being justified by past (or present) wrongs, with the aim of reparations being to improve the well-being of the recipients of those past (or present) wrongs into the future (through both compensation and structural reform).

Brophy highlights the vastness of the kinds of reforms normally called for by the reparationist:

That leaves open the question, once we get past studying, talking about, and apologizing for slavery and Jim Crow: of what reparations will look like. Richard Newman of the W. E. B. DuBois Institute at Harvard University suggested a domestic Marshall Plan as an analogy to the Marshall Plan that rebuilt Germany after World War II. He could not state, because indeed it is extremely difficult, the likely cost of reparations. In talking about reparations, one is talking, as Newman stated, "about something colossal."<sup>235</sup>

And like Coates, Brophy highlights the numbers often cited as clear evidence of the need for reparations in the wake of both institutionalized slavery and Jim Crow South injustices:

When reparations advocates make their case, they begin by talking about the gross differences in wealth, income, and educational achievement between blacks and whites in the United States today. The bare numbers are stark. The poverty rate for African Americans in 2004 was 24.7%. The poverty rate is near its lowest point ever, but still nearly one in four African Americans lives in poverty. Children have it even worse: 33.6% of African American children in 2004 lived in poverty. By comparison, a significantly lower percentage of non-Hispanic whites (8.6%) lived in poverty in 2004; 10.5% of non-Hispanic white children in 2004 lived in poverty. The median income for African American families in 2004 was \$30,134; for non-Hispanic whites, it was \$49,061 50% higher than for African Americans. In 2000, the median income for African American married couples was \$50,749 and for non-Hispanic white couples it was \$62,109, closer together.<sup>236</sup>

Such evidence of inequality could easily be multiplied across an entire spectrum. In terms of educational achievement, 88% of non-Hispanic whites have high school diplomas and 27% have college degrees, while 77% of non-Hispanic blacks have high school diplomas and 15% have college degrees. The story for health care is similarly bad. The infant mortality rate for black babies, for instance, is more than twice the infant mortality rate for white babies. Such figures, suggesting that we inhabit two separate nations, to borrow a phrase now common in political debate, serve as one pillar of the movement for reparations.<sup>237</sup> (pg. 57)

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<sup>235</sup> Brophy, *Reparations*, 17.

<sup>236</sup> Brophy, *Reparations*, 55–56.

<sup>237</sup> Brophy, *Reparations*, 57.

While there is broad agreement about the need for reparations in the reparations literature, there is of course disagreement about what constitutes reparations and about which policy approaches would actually advance those who have been wronged. J. Angelo Corlett offers:

Whatever else reparations require, they require the autonomy of oppressed individuals and the sovereignty of oppressed groups. And this autonomy and sovereignty implies freedom to not be reconciled or integrated with their oppressors if that is in fact what is desired by the victim or heirs of oppression. The key here is that any adequate theory of reparations for oppression must make primary the right to oppressed persons and groups to freely choose with whom they desire to associate. I take this to be a human right, if indeed there are such rights. Whether or not there are human rights, it is a moral right...<sup>238</sup>

My rejection of the utilitarian-based approaches to restorative justice implies that justice by way of reparations is mostly concerned with justice to victims of oppression and their heirs as a matter of fairness under morally acceptable rules of law, including compensatory criminal and tort law. Assumed here is the fact that “victims of crime deserve to be compensated”... Should this make amends between heirs of oppression impossible because the debts are too great to pay or otherwise rectify in full, this hardly counts against my argument for reparations... For if a society finds that its payment of reparations to its oppressed groups makes extraordinary demands on its economy—even long-term ones—that is not to be taken as a fault with reparations...<sup>239</sup>

William Darity and Kirsten Mullen offer a systematized approach to reparations that includes the alternative of atonement:

Reparations are a program of acknowledgment, redress, and closure for a grievous injustice. Where African Americans are concerned, the grievous injustices that make the case for reparations include slavery, legal segregation (Jim Crow), and ongoing discrimination and stigmatization... ARC—the acronym that stands for acknowledgment, redress, and closure—characterizes the three essential elements of the reparations program that we are advocating. Acknowledgment, redress, and closure are components of any effective reparations project. Acknowledgment involves recognition and admission of the wrong by the perpetrators or beneficiaries of the injustice. For African Americans this means the receipt of a formal apology and a commitment for redress on the part of the American people as a whole—a national act of declaration that a great wrong has been committed. But beyond an apology, acknowledgment requires those who benefited from the exercise of the atrocities to recognize the advantages they gained and commit themselves to the cause of redress. Redress potentially can take two forms, not necessarily mutually exclusive: restitution or atonement. Restitution is the restoration of survivors to their

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<sup>238</sup> Corlett, *Heirs of Oppression*, 8.

<sup>239</sup> Corlett, *Heirs of Oppression*, 9.

condition before the injustice occurred or to a condition they might have attained had the injustice not taken place. Of course, it is impossible to restore those who were enslaved to a condition preceding their enslavement, not only because those who were enslaved are now deceased but also because many thousands were born into slavery. But it is possible to move their descendants toward a more equitable position commensurate with the status they would have attained in the absence of the injustice(s)... Atonement, as an alternative form of redress, occurs when perpetrators or beneficiaries meet conditions of forgiveness that are acceptable to the victims.<sup>240</sup>

Robert Westley published an article in which he argued that direct compensation to individuals is insufficient (though, perhaps, is necessary) for the task of reparations:

Sufficient, in other words, to reflect not only the extent of unjust Black suffering, but also the need for Black economic independence from societal discrimination. No less than with the freedmen, freedom for Black people today means economic freedom and security. A basis for that freedom and security can be assured through group reparations in the form of monetary compensation, along with free provision of goods and services to Black communities across the nation. The guiding principle of reparations must be self-determination in every sphere of life in which Blacks are currently dependent.<sup>241</sup>

Additionally, beyond any perceived or real need for Blacks to participate more fully in the consumer market—which is the inevitable outcome of reparations to individuals—there is a more exigent need for Blacks to exercise greater control over their productive labor—which is the possibility created by group reparations.<sup>242</sup>

Westley focused on the need for institutional reform and Black agency as against mere cash repayments. Brophy, on Westley's work:

Westley made out the moral case for reparations in the broadest terms then available. He surveyed the horrors of slavery and the ways that even after slavery ended the system of segregation systematically disadvantaged African Americans in job and educational opportunities, in voting rights, and even in obtaining financing for housing. Discrimination by the Federal Housing Authority in funding for housing is often cited as evidence of the federal government's culpability in the Jim Crow system: In the years after World War II, when home ownership by whites was dramatically expanding, due in large part to the FHA's underwriting of mortgages, black home ownership did not increase so drastically. The FHA engaged in "redlining," drawing lines in red on maps of residential real estate that marked the less desirable areas. The FHA would not underwrite mortgages in the areas in red. Those discriminatory practices, which were in part a response to consumers' wishes, illustrate some of the choices made by

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<sup>240</sup> Darity and Mullen, *From Here to Equality*, 3.

<sup>241</sup> Westley, *Many Billions Gone*, 470.

<sup>242</sup> Westley, *Many Billions Gone*, 468.

government that in turn left many minorities with little opportunity or ability to acquire homes. Those who already owned homes in redlined areas saw their property values decline while homes outside the red lines increased in value.<sup>243</sup>

Similarly, Manning Marable calls for a rejection of institutional white supremacy and the ethic of white supremacy:

... white Americans, as a group, continue to be the direct beneficiaries of the legal apparatuses of white supremacy, carried out by the full weight of America's legal, political, and economic institutions. The consequences of state-sponsored racial inequality created a mountain of historically constructed, accumulated disadvantage for African Americans as a group.<sup>244</sup>

Marable and Westley argue that cash payments to affected individuals are insufficient to the task of correcting for past wrongs and that necessary for fuller compensation (i.e., reparations) are more equitable power relations.

Robinson emphasizes that affirmative action policies, though perhaps part of the solution, are insufficient for very many victims of past and present wrongs. He charges emphases on affirmative action policies of being sensitive to the situations of more advantaged Black Americans, but of being hardly adequate for the very poor. Robinson argues that improving the well-being of those in the most disadvantaged positions requires direct and robust distributive justice:<sup>245</sup>

They are palliatives that help people like me, who are poised to succeed when given half a chance. They do little for the millions of African Americans bottom-mired in urban hells by the savage time-release social debilitations of American slavery. They do little for those Americans, disproportionately black, who inherit grinding poverty, poor nutrition, bad schools, unsafe neighborhoods, low expectation, and overburdened mothers.<sup>246</sup>

The historical documentation of the wrongs committed against Black Americans (even those committed in the last century) and the data which indicate massive economic, education, and

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<sup>243</sup> Brophy, *Reparations*, 68.

<sup>244</sup> Marable, *Black Reparations*.

<sup>245</sup> Brophy, on Brooks's work: "Brooks makes his detailed case for reparations on a twofold argument. First, he notes that slavery denied African Americans life and liberty, as well as the opportunity to acquire wealth to give to their descendants. Thus, it impoverished people at the time and successive generations. Second, even after slavery ended, the period of Jim Crow prevented African Americans from fully participating in the acquisition of education and wealth," *Reparations*, 74.

<sup>246</sup> Robinson, *The Debt*, 8.

health disparities along racial lines make a compelling case for the claim that sufficient corrective and distributive justice have yet to be carried out. In my view, each of the elements discussed above—redistributions of wealth, affirmative action policies,<sup>247</sup> structural reforms that result in more equitable power relations—is a necessary condition of a complete reparation for past wrongs.

In the next section, I offer my own argument for two different sets of claims to reparations. In the section following that, I use my argument *for* race reparations to respond in detail to prominent arguments *against* race reparations. I will save the bulk of those arguments against reparations for that section, so as to set them up and knock them down in the same place. But here is a very quick review of those sorts of accounts. Clifford Angel Bates, Jr., (2021)<sup>248</sup> argues against reparations on grounds that, since racial harms have ceased, minority communities should forgive and move on. John McWhorter (2018)<sup>249</sup> argues against reparative policies like affirmative action on grounds that they do not help the most disadvantaged. David Horowitz (2001)<sup>250</sup> argues against reparations for several different reasons—that responsible parties are hard to identify, that only a small proportion of white Americans owned slaves, that it is unclear that all African Americans today suffer from the consequences of slavery, that reparations have already been paid, and several others. George Sher (1981)<sup>251</sup> argues against reparations on grounds that there is no way for us to know that there really is a direct causal chain from some past wrong to some present day disadvantage, and thus on grounds that there

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<sup>247</sup> I endorse Harris and Narayan's work on affirmative action, in which they argue that affirmative action ought not be conceived of as either a form of compensation or as a means merely to the end of promoting diversity. They argue these things, in part because these frames mischaracterize affirmative action policies as providing "justifiable preferences" to the beneficiaries of the policies. In their words: "We argue that affirmative action policies should be understood as attempts to equalize opportunity for groups of people who confront ongoing forms of institutional discrimination and a lack of equal opportunity," "Affirmative Action," 247. Affirmative action, that is, not as a form of compensation, but rather as an equalizer of opportunity. In my work, I have called affirmative action a form of reparations, not because I think it is a form of compensation, but rather because I think it is one necessary response to past and present wrongs (among them, unequal distributions of wealth and opportunity).

<sup>248</sup> Bates, "Grievance and Forgiveness."

<sup>249</sup> McWhorter, "Affirming Disadvantage."

<sup>250</sup> [Horowitz], "Ten Reasons."

<sup>251</sup> Sher, "Ancient Wrongs."

is no way to attribute moral responsibility for a particular wrong or debt with certainty. I address these anti-reparations accounts in detail in Section C of this chapter.

### B. Two Different Morally Legitimate Claims to Race Reparations

In a previous chapter, I offered the following argument from my foundational claims about human worth and the rights that supervene on it to the claim that reparative justice and compensation are *owed* to Black Americans:

1. Black humans have immense, ineradicable human worth, in virtue of their *humanity*.
2. Beings of thus and such a worth command respect. That is, any morally legitimate claim of theirs is normatively forceful.
3. Morally legitimate claims are normatively binding, so to violate one makes one blameworthy; to violate intentionally is a wrong, and definitionally, an instance of injustice.
4. On human worth, claims supervene against other individuals—and against the systems and institutions in which Black humans have always found themselves—to certain treatment and life-goods. The particular goods and treatment to which humans have claim vary from context to context but are determined by objective facts of the matter regarding that which is good for things like us, humans.
5. These claims preclude the permissibility of many of the historical wrongs committed against Black humans: institutions like human chattel slavery, police brutality, hate crimes and racial slurs, racist economic or housing policies that impoverish or disadvantage Black humans, etc.
6. Violations of such claims result in real psychological, bodily, or economic damages, the latter of which can compound over generations of injustice.



7. So, Black humans have historically been wronged, and to the extent that these race-related wrongs continue, at least some Black humans are currently wronged by them.
8. Those individuals, institutions, or organizations that committed (or commit) the wrongs are blameworthy and ought to be held accountable.
9. Corrective justice and redistributive justice need to be applied to instances of such wrongs.
10. Those who violate the rights of Black rights-holders, then, ought to be punished in accordance with the law, and reparations ought to be rendered such that the well-being of the wronged is as if the wrong were never committed, or such that the well-being of the wronged is improved to that point to whatever extent possible.
11. These wrongs, then, generate for Black rights-holders new claims against the State to its execution of justice; and they generate for Black rights-holders new claims against those who wronged them to repayment for damages.
12. Therefore, in virtue of past and present wrongs, at least some Black Americans have morally legitimate claims to corrective and compensatory justice; that is, race reparations.

Thus, it follows from my rights-first account of justice, in which justice is ultimately reducible to talk of whether or not a rights-holder has been rendered those life-goods to which she has morally legitimate claim, that Black Americans (whose status is historically and currently that of *wronged*) are *owed* race reparations, quite aside from any of the epistemological, political, or pragmatic difficulties cited by opponents of race reparations.<sup>252</sup>

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<sup>252</sup> When it comes to race relations in the American social context, some of the most glaring instances of racial injustice have been inflicted on the Black community. But similar injustices have been inflicted on other groups throughout our history—the Native American nations, various immigrant and refugee

Moreover, it follows from my broadly Wolterstorffian take on justice and structural justice that Black Americans have two different kinds of morally legitimate claims to race reparations, as a product of the two different modes of injustice Black Americans have been individually and collectively subjected to—instances of direct violence, and instances of concentrated and structural disadvantage. To demonstrate that, I'll add four statements to the end of that argument:

13. Black rights-holders have (historically and currently) been made victims of both direct violence and concentrated structural violence.<sup>253</sup>
14. Whether the violence committed is direct or structural, in at least some cases compensation is due.
15. Whether the violence committed is direct or structural, the victim has a legitimate claim to the cessation of the violence; in the case of structural violence, this entails claims to structural reform, more equitable power relations, and the dismantling of social relations that perpetuate structural violence.
16. Therefore, in virtue of their ineradicable human worth, facts of the matter about that which should be considered their life-goods, and facts of the matter about their historical treatment, at least some Black rights-holders have morally legitimate claims to compensation for past and present racial injustices, and at least some Black rights-holders have morally legitimate claims to structural reforms that ensure more equitable power relations, fairer distributions of resources, cessations of racial inequities in education and in the criminal justice system, etc.

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communities, nations we have bombed, etc. Injustice and concentrated disadvantage, no matter the group or individuals who are disadvantaged, will result in morally legitimate claims to reparations.

<sup>253</sup> Note that I am using "violence" here in the expanded sense *à la* Galtung.

I call both sets of claims—the set addressing compensation, and the set addressing structural reform—“reparations,” because they are both reparative. Structural anti-Black racism precludes compensation for past and present wrongs and any comprehensive clearing of debts because structural anti-Black racism perpetuates violence and is itself violent (causes deficits of mental and somatic realizations). The first kind of morally legitimate claim to reparations is a claim (or set of claims) to direct compensation for direct or structural wrongs; the second kind of morally legitimate claim to reparations amounts to a morally legitimate claim (or set of claims) to structural reforms that would disrupt concentrated racial disadvantage, structural violence, and those social arrangements that unfairly situate Black America.

I endorse Nozick’s characterization of compensation:

Something fully compensates a person for a loss if and only if it makes him no worse off than he would otherwise have been; it compensates person *X* for person’s *Y*’s action *A* if *X* is no worse off receiving it, if *Y* had not done *A*.<sup>254</sup>

Rights to reparations are generated by some wrong, and corrective justice in these cases will be one-part punitive (when possible) and another part compensatory. When we speak of reparations for wrongs in the distant past, like those wrongs associated with the transatlantic slave trade, or the Jim Crow South,<sup>255</sup> we should grant that present-day rights-holders cannot accept or be rendered the punitive component of justice—the original wrongdoer is gone, and the rights-holder who was originally wronged is gone. That is, no one today should go to jail for some wrong that was committed by someone else in the past.

However, compensation can still be rendered and the compensation, if never paid to the originally wronged, is *owed*. So there is a critical distinction here between *responsibility for a wrong* and *responsibility for a debt incurred*. The payment of compensation is not *punishment*—that debt is inherited, as is the legitimate claim to that debt; whoever owes the debt today (assuming we are talking of an individual’s wrong, and not a nation’s or corporation’s wrong) is

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<sup>254</sup> Nozick, *Anarchy*, 57.

<sup>255</sup> Valls and Kaplan, “Housing Discrimination.”

not *guilty* or *blameworthy* in any sense associated with the original wrong. We can treat compensation owed to someone who has been wronged like property that can be inherited.<sup>256</sup> And of course, when a rights-holder is wronged today, whether or not that wrong has to do with race, similar legitimate claims to corrective justice obtain.<sup>257</sup> This is not to say that I am committed to a view in which individual rights-holders must be the payees of legitimate moral debts; we could just as easily imagine a federalized approach to compensation.

Bittker and Fullinwider both argue that much of the structural disadvantage that persists today in the African American community, more than being a direct result of the original injustice of slavery, is largely attributable to the failure of our national government to protect the liberties of the formerly enslaved in the aftermath of the Civil War.<sup>258</sup> Bittker goes so far as to claim that Black communities would face no concentrated disadvantage today had the government acted swiftly to countermand the racist policies of the post-War South and the racist policies of the Jim Crow South. That is, had liberties been secured immediately, the playing field would have been levelled. But secured liberties in the aftermath of grave injustices like chattel slavery is not sufficient for compensation and after centuries of slavery the only thing that would have leveled the playing field is direct compensation for centuries of stolen labor. I agree that more proactive actions would have gone a long way toward allowing the African American community to begin to build wealth and achieve economic and legal equity relative to their white peers, but undoubtedly egregious wrongs like those of slavery itself or the Jim Crow South have to be addressed, too.

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<sup>256</sup> Cf. Boxill, "Morality of Reparation" and Kershner, "Descendants of Slaves."

<sup>257</sup> Worth exploring, although I will not do so here, is a consideration of the *wrong* that obtains in our failure to make compensation for past wrongs—this wrong, too, is evaluable in the terms of justice, as it constitutes a failure to meet our duties to resolve instances of avoidable deficits that have in their etiology some wrong in the past (distant or recent). Not only do past wrongs need to be addressed, but the persisting failure to address a past wrong is itself a wrong, and we can perhaps conceive of such persisting failures in terms of compounding moral interest.

<sup>258</sup> See Bittker, *Black Reparations* and Fullinwider, "Case for Reparations."

It is not enough that the liberties of marginalized groups are secured after some egregious wrong; the nature of the crimes committed against the Black American community are such that massive debts are owed and compensation is due for the *wrong* itself, regardless of the actions of the State to secure Black Americans' liberties following the Civil War. Whether or not Black Americans' civil and bodily liberties were secured after the Civil War, centuries of bondage had already amounted to real and inheritable damages. The debts incurred by generations of human trafficking and abuse did not just evaporate with emancipation, and it is not plausible to claim that emancipation and the civil liberties established after emancipation amount to compensation. Had action been taken after the Civil War to fully compensate the victims of slavery, such actions would have fulfilled Nozick's notion of compensation and reparations for those wrongs would not be needed. The problem with holding the view that securing Black liberties after the war would have been sufficient for compensation is that it is not at all clear that simply guaranteeing a former slave would be treated as fully and wholly a citizen (after the slave was freed) would compensate that former slave for (potentially) decades of forced bondage, torture, suffering, and stolen wages. Securing the former slave's liberties would have been a necessary condition of compensation, but it would not have been sufficient.

There will be two modes of the *direct* variety of race reparations for past wrongs: the first mode pertains to cases of a wrong that was committed in the distant past and in which case compensation was never paid and there is an outstanding debt, and the second mode pertains to cases of a wrong that was committed in the distant past and in which both compensation was never paid and it can be plausibly argued that the past wrong continues to directly harm present day rights-holders. In the first case, we are painting a simple picture: cases in which there are debts that were never repaid, and claims to those debts were simply inherited by subsequent generations. In the second case, we are describing a more complicated picture, in which there is a past wrong that was never corrected and a rights-holder who was never compensated, and the past wrong either caused subsequent states of affairs in which new harms are dealt to

present day rights-holders or the past wrong and the lack of compensation has accrued in the form of persisting present day structural violence (like racialized generational poverty). In either sort of case, the past wrong is remedied by compensation, and that compensation should be considered a life-good to which some present-day rights-holder has a morally legitimate claim (either because the claim and debt were simply inherited, or because the claim is generated by present-day consequences of past wrongs, these consequences themselves being instances of injustice).

The morally legitimate claim to *structural* reparations or structural reform is a product of the preceding work on structural injustice and concentrated disadvantage. Sometimes, debts are clearly owed by individual rights-holders in virtue of the wrongs they have committed. But other times, wrongs are the product not of individual rights-holders but rather of social structure and patterned social arrangements and institutions. In these cases, it will be the case that a *government, institution, or society of individuals* owes some wronged individual compensation; it will also be the case that the rights-holders who exist within social structures and social arrangements have morally legitimate claims to existing in social structures in which they are not systemically wronged or disadvantaged as a product of factors like race, geography, or income level. Rights-holders who do exist in those inequitable or exploitative social relations have legitimate claims to structural reform, to a resolution to their exploitation and lack of access to social, political, cultural, or financial capital. This legitimate claim to reform might include direct compensation for some structural injustice committed by a government or other entity, but the focus here will be the structural reforms *owed* to rights-holders in light of past wrongs and the unjust states of affairs that may persist today as a product of those past wrongs. Needed will be just and equitable access to the various kinds of capital there are to be had in a society, just and equitable distributions of resources and public goods, and just and equitable means of political participation.

When a rights-holder exists in a web of social relations that disadvantages them unjustly, or when they are related to institutions and government in ways that withhold from them those life-goods to which they have morally legitimate claim—in addition to any relevant compensation the rights-holder is owed, they are owed a reformation of the unjust and exploitative social relations that will perpetuate wrongs if not addressed. Rights-holders have legitimate claim to existing in a web of normatively binding social relations that does not exploit them or withhold from them their right *merely as a product of the structure of that web and the way it disadvantages individuals and communities according to factors like race or geography or income*; and that legitimate claim is constituted by various sets of claims to particular reforms, according to their socio-moral context.

Elizabeth Anderson presents injustice in structural terms similar to Rubenstein's, and Rubenstein's work and Anderson's work run helpfully parallel. Anderson discusses what we have been calling structural injustice in terms of *concentrated disadvantage*—the various disadvantages that accrue to certain individuals or groups as a result of social situation, either by design or as a product of some past wrong or some present neglect (willful or not).<sup>259</sup> Anderson's work focuses on a particular structural injustice: racial group inequity in America. Anderson hones in on the structural causes of racial group inequity and she argues for a fuller integration of racial groups, a sometimes-literal spatial rearrangement of our social relations to one another and to social institutions. Anderson makes the case that racial segregation is the underlying cause of racial group inequity due to the effect segregation has of establishing and entrenching asymmetric power relationships in a society:

Segregation of social groups is a principal cause of group inequality. It isolates disadvantaged groups from access to public and private resources, from sources of human and cultural capital, and from the social networks that govern access to jobs, business connections, and political influence. It depresses their ability to accumulate wealth and gain access to credit. It reinforces stigmatizing stereotypes about the disadvantaged and thus causes discrimination... Segregation also undermines democracy. The democratic ideal

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<sup>259</sup> Anderson, *Imperative of Integration*.

seeks a culture and political institutions that realize society as a system of equal citizens. Democratic political institutions should be equally responsive to the interests and concerns of, and equally accountable to, all citizens. Segregation impedes the realization of this ideal and these principles. It impedes the formation of intergroup political coalitions, facilitates divisive political appeals, and enables officeholders to make decisions that disadvantage segregated communities without being accountable to them. It undermines the competence of officeholders by limiting their knowledge of and responsiveness to the impacts of their decisions on the interests of all.<sup>260</sup>

... the problem I propose to investigate is the persistence of large, systematic, and seemingly intractable disadvantages that track lines of group identity, along with troubling patterns of intergroup interaction that call into question our claim to be a fully democratic society of equal citizens.<sup>261</sup>

Anderson argues that one of the primary causes of concentrated racial disadvantage is racial segregation, as in many segregated environments the lines to cultural, social, political, and financial capital are cut off to groups that are arbitrarily (but at least initially, intentionally) relegated to disadvantageous social positions.<sup>262</sup>

Anderson's relational theory of inequality is an account of the causes of group inequality. It explores inequities across racial groups, and rather than locating the cause of the inequities in some intrinsic feature of members of disadvantaged groups, it locates the cause of race-based inequities in social *relation*. Anderson's is a structural approach, though of course Anderson's account is not blind to the individuals who make up the social relations that are her priority:

This book concerns group inequality: modes of social organization whereby bounded social groups are subject to systemic disadvantages in relation to dominant groups. Large, stable, systematic social inequalities across the world are tied to many kinds of group identities, as of race, gender, ethnicity, religion... Charles Tilly has called these "durable inequalities." I prefer to call them "group" or "categorical" inequalities to stress their ties to paired social categories... Max Weber argued that categorical inequality arises from social closure. If a group has attained dominant control over an important good, such as

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<sup>260</sup> Anderson, *Imperative of Integration*, 2.

<sup>261</sup> Anderson, *Imperative of Integration*, 3.

<sup>262</sup> This does not necessarily apply to those instances of segregation that are entered into willingly, such as when members of cultures cloister together in certain parts of town. But we should note that even in at least some of those cases, the willingly entered into segregation will have the negative deleterious effects associated with other forms of segregation, in addition to whatever positive benefit the willing segregation has conferred on the members of that community (cultural preservation, a sense of safety, or belonging, for instance).



land, military technology, education, or purported access to the holy or divine, it often secures this advantage by closing its ranks to outsiders.<sup>263</sup>

The relational theory of inequality locates the causes of economic, political, and symbolic group inequalities in the relations (processes of interaction) between the groups, rather than in the internal characteristics of their members or in cultural differences that exist independently of group interaction. It provides a useful perspective for normative purposes because unequal relations among people (that is, modes of social hierarchy), as manifested in their interactions, are proper objects of direct normative assessment in a theory of justice. This relational approach contrasts with views that take de facto inequalities in goods as objects of direct normative assessment independent of the relations through which they are produced or their effects on social relations.<sup>264</sup>

Anderson contends that it is *relations*—that is, patterns of interactions within the bounds of systems, institutions, and social structure—which ought to be conceived of as either just or unjust, rather than taking unequal distributions of goods (independent from social relation) to be the object of evaluation.

Anderson claims that when a power relation between two groups becomes so asymmetrical that one group can deprive another of certain goods, the concentrated disadvantage (the poverty that accrues as a result of the structure of the social relation) can amount to violations of rights:

Group inequalities arise when a group has acquired a dominant position with respect to a critical good such as land or education and practices social closure to prevent other groups from getting access to these goods, except on subordinating terms. Social closure, or segregation, thus has two sides: suppression of intergroup contact when such contact would cede equal access to the good to outsiders, and promotion of intergroup contact when the advantaged group can relate to outsiders as authorities to subordinates and thereby manipulate the terms of intergroup cooperation to its advantage. A group's dominance over one good then extends to others by emulation, adaptation, leverage, violence, and political control. Group inequality thus arises from the relations or systematic interactions between social groups... Oppressive social relations are unjust because they deprive members of the disadvantaged group of their basic human rights.<sup>265</sup>

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<sup>263</sup> Anderson, *Imperative of Integration*, 7.

<sup>264</sup> Anderson, *Imperative of Integration*, 17.

<sup>265</sup> Anderson, *Imperative of Integration*, 21.

Anderson argues for racial group integration, on grounds that the only way to create access to social, cultural, political, and financial capital for disadvantaged groups is to create *proximity* for those groups to those various forms of capital.<sup>266</sup>

Anderson's work highlights how social relations can result in some individuals or communities (but not others) having their right deprived them, their claims and worth disrespected. Her account explains the ways *social arrangements* can yield violence. I have argued that it is our *normatively binding social relations*, our socio-moral relations to others and the normatively binding aspect of those relations that are evaluable in the terms of justice or injustice. These social relations obtain between two individuals and they obtain between an individual and broader social structures or institutions. Whether we speak of an individual withholding from another individual that to which they have legitimate moral claim, or whether we speak of an individual (or group) being socially situated in such a way that they are systemically deprived power or life-goods, we should think of disadvantages and wrongs as being violations of normatively binding social relations.

Concentrated disadvantage and structural injustice are instances of injustice, in my view, for no other reason than that they are instances of human worth being disrespected and the rights to certain life-goods (which supervene on that worth in tandem with objective facts of the matter about that which is good for things like us) being violated. And it is important for my view to have the resources needed to speak of injustice in such structural terms, because while much of the disrespect for the worth of Black Americans that needs to be addressed is interpersonal,

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<sup>266</sup> Probably, racial group integration is not the only way to create access to the various forms of capital within these disadvantaged groups. But I agree with Anderson that integration is a *very good way* to do so—and probably the best way. Other alternatives: external investments in racially homogenous communities, massive public works in racially homogenous communities, sizable grants or even micro-loans to racially homogenous communities. It is probably false that racial group integration is the only way to create access to capital; however, Anderson is probably right in the sense that that racial group integration is the only way to eventually create *equitable* access to the various forms of capital that there are. The challenge to Anderson, here, would be the observation: *What good is mere integration if it does not also come with a redistribution of resources, or a mechanism for giving previously disadvantaged groups the means to determine resource allocation?* Justice cannot be mere togetherness, after all; there is also the matter of power.

the rest of it is a systemic and institutionalized disrespect for the worth of Black Americans; and just as interpersonal injustices demand procedural correction and reparations for damages, so, too, do institutional and systemic injustices. I have tried to make it clear that direct injustices and structural injustices are both instances of disrespect for human worth, that they are both violations of the claims of rights-holders to proper treatment and certain life-goods, and that both warrant (at least sometimes, and for the very same reasons) both procedural justice and compensation for damages.

Anderson's work here on the causes of group inequality provides us with one further way of thinking structurally about the reparations that are owed to Black America. Given her work, I offer that we should incorporate into our reparations model a set of morally legitimate claims to racial group integration, claims to a resolution of the root cause of concentrated disadvantage (targeted segregation). These claims to integration and the disruption of concentrated disadvantage should be considered reparations in the broadest of senses—that of their being a response to past and present wrongs. Anderson's work is qualitatively different than some of the others we have discussed, but with it we can hone in on at least one structural reform relevant to our socio-moral context—that of integrating racial groups so as to create equity with regard to access to capital. For very many, this integration should be considered a life-good to which they have morally legitimate claim in light of past and present wrongs; and to the extent that integration is a morally legitimate response to past and present racial wrongs, it should be considered reparative.

Further structural reforms will be necessary, including policing reforms, education reforms, and finance reforms; in as much as our present day institutions and policies disadvantage some individuals and groups according to factors like race, the rights-holders wronged by those social arrangements have legitimate claim to a cessation of those structural wrongs (and to compensation). To withhold from those who are *owed* either variety of reparations is to fail to respect them, to fail to show proper respect for their worth, and to violate

the morally legitimate claims they have. Earlier, we saw Brophy's characterization of reparations as one-part backward looking and another-part forward looking. Failure to make these reforms will only lead to further structural disadvantage and the need for further compensation down the road. Structural anti-Black violence not only precludes compensation, it perpetuates disadvantage and many of its manifestations are either themselves the result of past wrongs or instances of new unacceptable violence.

We asked, "What are the requirements of justice with regard to Black Americans today, in light of historical wrongs?" Direct compensation for particular (past and present) wrongs is owed, and the reformation of those social arrangements which perpetuate concentrated and structural disadvantage is owed. Until those requirements of justice are met, the status of Black America will continue to be that of "wronged" and structural injustice will obtain. Until those claims are met, our society will be characterizable neither as *just* nor as *justly structured*, both because the violence caused by the persistence of these injustices is in its own right an injustice, and because the deficits of mental and somatic realizations caused by the persistence of these injustices are *unacceptable* in our 21<sup>st</sup>-century socio-moral context.

Policies like affirmative action, massive investments in public goods (like New Deal era programs that brought electricity to the Mississippi River Delta), the Great Society initiatives that reduced poverty rates, and universal basic income serve multiple purposes, but they are each potentially structural attempts to address past wrongs or generate group equity. As cited above, the data are clear that these policies have not yet amounted to full compensation and structural justice, but I take it that in at least some socio-moral contexts rights-holders whose status is historically and currently that of *wronged* have morally legitimate claim to such policies. Indeed, such policies are necessary components of the kinds of structural reforms to which wronged rights-holders have legitimate claim in light of the structural injustices committed against them. But the problem with proceeding as if affirmative action, public goods investments, and universal basic income can replace direct compensation for historical or present wrongs is that

many of the wrongs visited upon the African American community incurred debts of massive scale, often in the form of multiple generations of lost wealth. Just as these debts did not evaporate with the emancipation of slaves, they do not evaporate with even aggressive affirmative action policies, gratuitous investments in public goods, or universal basic income (unless, of course, such things can be shown to have fully compensated individuals and communities for the debt owed to them).

Affirmative action in the marketplace is a structural approach designed to make historically marginalized groups better represented and more competitive in the marketplace, but that a given board room is demographically more representative of the general population than it was a century ago is no guarantee that a *particular* rights-holder whose ancestor was egregiously wronged in the past, or who is currently structurally disadvantaged, has received any measure of advantage or compensation today. Similarly, that a particular city benefits from some massive investment in public education or parks services is no guarantee that the unjustly incarcerated or the descendant of the unjustly incarcerated, for instance, will benefit or be paid in full for that which was unjustly taken or withheld from them.

So, while I am supportive of public policies like affirmative action and investments in public goods as ways to raise tides and ships, such policies are no guarantee that *particular wrongs* will be addressed or that *particular rights-holders* will be compensated for egregious wrongs in virtue of which they have legitimate claim to compensation or structural reform. And I grant that, given the epistemic issues with specifying to whom what is owed, even my approach of direct repayment for past wrongs will leave out some—as a product of our inability to locate and quantify every wrong committed and the debt it incurred. But, we can address a great number of them and should do so. Similarly, though they fail to address the wrongs committed against very many individual rights-holders, we can exercise affirmative action policies and investments in public goods as a way of equalizing access to future opportunity and hedging

against racialized economic inequity. In an attempt to make things more structurally just, we should do so.

Members of historically wronged communities may well have morally legitimate claims against their State to these sorts of public policy approaches; but following the wrongs committed against them or their ancestors, they also have morally legitimate claim to compensation. And for all we should champion these public policy measures, if morally legitimate claims to race reparations in the form of compensation are ignored to the extent that the condition of compensation is not met, then we ignore the demands of justice. As such, we are left with the view that in addition to structural reforms, a necessary component of making race reparations will be robust redistributions of wealth that compensate individuals, families, and communities for past and present-day wrongs. The practical implementation of such compensation will come with political and epistemological difficulty, but that there are political and epistemological difficulties is no argument against the claim that: *What is owed to at least some Black Americans in virtue of their ineradicable worth and the various ways they have been disrespected throughout history is compensation and structural reform.*

### C. The Case Against Reparations

As I said at the end of Section A, there is a case against reparations, too. In that section, I offered a very quick survey of prominent anti-reparations lines of thought, and here I will address them in more detail. It should be noted that rather than being a principled refutation of either the historical record or various principles of justice and fairness, the case against reparations tends to be a political argument that appeals to the various difficulties associated with making reparations.

The issue of reparations raises interesting philosophical puzzles regarding moral indebtedness, the inheritability of claims and harm, and collective moral responsibility. It raises further puzzles about the indebtedness of wrongdoers to the wronged and the transfer of moral

accountability for those wrongs across time. Brophy summarizes the various arguments of the opponent of race reparations into these broad categories:

1. That there have already been adequate reparations paid through the Civil War and social welfare programs, like the Great Society,
2. That taxpayers should not have to pay, because they are innocent; that is, they have no culpability for the actions of past legislators and private individuals, and they have no benefit from the legacy of slavery and Jim Crow,
3. That compensation is impracticable or politically unworkable,
4. That reparations are divisive and focus attention of the Black community in the wrong places,
5. That slavery is, on balance, a benefit to the descendants of the enslaved.<sup>267</sup>

We could well add to Brophy's points the following three:

6. That some relevant statute of limitations has run out, or that over time some claims may simply fade away; over long periods of time our epistemic footing becomes less sure, and the diffusion of the descendants of wrong-doers and victims across nations, religious groups, and ethnic groups makes the answering of claims less reasonable
7. That it is impossible to identify an appropriate recipient for reparations<sup>268</sup>
8. That victims of racialized wrongs should just forgive wrongdoers and move on<sup>269</sup>

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<sup>267</sup> Brophy, *Reparations*, xvi.

<sup>268</sup> In very many cases, it *is* possible to identify the appropriate recipients of reparations. We should simply spend our political energy on those clear cases. But I grant that in some cases, it may well be impossible to identify the appropriate recipient. Later on, I offer that we should err on the side of being reasonably over-permissive with regard to who gets reparations—it is better, I take it, for some people who are *not strictly speaking owed* to receive compensation than it is to allow some more exacting standard or process to withhold life-goods from those who *are legitimately owed*. Against the overly permissive model in general, and against racial affirmative action policies in college admissions in particular, John McWhorter (McWhorter, "Affirming Disadvantage") writes: "But only a small fraction of today's black and Latino students at selective universities grew up in anything like poverty, as we know from endless reports of how grievously few poor people of any kind gain admission to selective schools." But this, in my view, is not so much an argument against such policies, so much as it is an argument for a more aggressive application of such policies.

I will not interact with Brophy's (4) and (5), on grounds that the former is beside the point and that the latter is absurd.<sup>270</sup> But the foundation of a case against reparations for past wrongs is two-fold: first, a rejection of the attributability of moral responsibility for some past or present wrong to someone in the present who did not personally commit that wrong on grounds that they are not possibly blameworthy, and second, a rejection of the inheritability of a claim to reparations for some past wrong on grounds that present day rights-holders did not themselves experience that particular injustice.

I reject (6) in principle, on grounds that in my Wolterstorffian view, there is no statute of limitations on human worth or the morally legitimate claims to life-goods and compensation that supervene on human worth; further, there are potentially very many instances of reparations owed from the recent past, and talk of expired statutes of limitations in these cases would not be sensible. Too, there is no principled reason to believe a morally significant debt incurred in the relatively recent past has simply evaporated with time; after all, the operative "compensation" concept involves the correction of some past wrong. I am certainly willing to accommodate statutes of limitations with regard to the *punitive* component of justice in cases of past racial wrongs, on grounds that in very many cases the wrong-doer is long-dead and cannot be punished—but when it comes to *compensation*, *punishment* is beside the point.

There is an important sense, however, in which the passage of time does make the meting out of reparations difficult, if not impossible; in some such extreme cases, the expectation that reparations be paid would strain plausibility. Take some wrong that was committed in the very distant past—say, thousands of years ago. And let's say that this wrong

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<sup>269</sup> Clifford Angel Bates, Jr., (Bates, "Grievance and Forgiveness") argues that forgiveness is appropriate because racial harm in America has ceased. In this paper, I have illustrated clearly why we should think that racial harm has *not* ceased. And even if it had ceased, debts would persist for past wrongs.

<sup>270</sup> That reparations talk is politically divisive is certain, but that does not say anything about what Black Americans may be objectively owed. That descendants of the enslaved are better off for the institution of slavery is absurd, because many Black Americans are in verifiably unjust situations and because racial disparities that have their roots in racist policies and institutions are well-documented. Not to say anything of how the "slavery was, on balance, a good" analysis ignores the grave injustices of slavery itself and the grave injustices that followed in the Jim Crow era.



was just discovered in an archaeological excavation last week, the wrong-doer and victim clearly and unambiguously identified. At this point, the wrong-doer has potentially hundreds of thousands of descendants and the victim has potentially hundreds of thousands of descendants. So, one might ask: are reparations really *owed* in this case? I say: probably not. For one, the familial and DNA relations to the original wrong-doer and victim exist, but only in nearly negligible (genetic or biological) terms and most of the descendants probably will never know about their relation to either the wrong-doer or the victim, much less feel some affinity for them or intimacy with regard to them. Too, with the passage of time the descendants of victims and wrong-doers are scattered across various nations, religious sects, and ethnic groups. It would simply be impossible to identify everybody who is owed and everybody who owes a debt of compensation. So in a case like this, it is not as if the international community could pressure, say, one well-defined nation or religious community to pay a debt of compensation to some other well-defined nation or religious community; the passage of time blurs these simple categories and makes the payment of reparations by one group to another implausible.

The long passage of time can also erase (or simply lose track of) the negative effects of past wrongs, while compounding negative effects that have nothing to do with the wrong in question; alternatively, the long passage of time could potentially serve as an opportunity and well-being equalizer, perhaps negating particular claims. Statutes of limitations are in place in contemporary law, largely due to the epistemic difficulties that come with the passage of time—witnesses die, memories fade, and documents are lost, and procedural justice relies on good testimony and accurate records for its integrity. These problems would only be multiplied in the case of arbitrating a wrong from thousands of years ago. But we should note here that American history and American anti-Black racism are not subject to these historical difficulties—in very many cases, it is relatively clear who was wronged, who did the wronging, who is presently disadvantaged because of the wronging, and who is owed (and who owes) the debt of compensation or reform. That we cannot reasonably expect some wrongs in the very distant

past to be compensated for is no reason to think that more recent wrongs should not be. Put simply, the wrongs associated with American racism are hardly the distant past. American anti-Black racism populates the recent past, and the present.

I reject (7) on grounds that in at least very many cases, the proper recipient of reparations *can* be identified and if we are presented with cases in which the recipient of reparations is underdetermined or unknowable, we should simply want to focus on those cases in which the recipient of reparations *is knowable*.

And I reject (8) on grounds that, although forgiveness is a necessary feature of the reconciliation process and of healthy political community in general, it is a torturing of our “forgiveness” concepts to use the expectation of forgiveness to justify the canceling of every debt owed for identifiable racialized wrongs and to perpetuate both tangible disadvantage and the need for compensation. We should want for there to be forgiveness, and to some extent forgiveness for moral guilt should be expected, but forgiveness need not preclude either compensation or structural reforms. Indeed, forgiveness may only serve to perpetuate racial wrongs, if by “forgiveness” we mean the relinquishing of responsibility for the correction of laws, systems, and institutions that reliably and predictably *wrong* members of some racial groups but not others. Certainly, someone who was wronged may forgive the inheritor of the debt that is owed *of that debt*; in such a case, the debt would be absolved. Alternatively, someone who was wronged may forgive someone in the sense that they wish to absolve the wrongdoer of feelings of moral guilt or shame, yet still expect the compensation to be repaid. But the wronged do not owe forgiveness of either sort to the wrongdoer (though they may owe it to themselves or to God to forgive the wrongdoer in either of the two above ways) and if compensation is owed for some past wrong then that debt should be paid. Forgiveness is a virtue of sorts, but it should not be used as a blunt weapon against the wronged, negating their claims to reparations. Doing so would only serve to perpetuate a variety of injustices.

Brophy hints that opposition to reparations talk may be rooted in political, racial, or national identity, or at least in how one identifies culturally:

As reparations talk has grown, so has opposition to reparations. Arguments for reparations for slavery and its claims for an accounting of past injustice, for apologies and truth commissions, for reconciliation of decades-old debts and forward-looking relief, and for group-based relief represent yet another front on what has been called the “culture wars” of the 1990s and 2000s. The case for reparations rests on how the past is viewed and what one believes should be done about it.<sup>271</sup>

Writer David Horowitz is a fitting example of Brophy’s point. Horowitz does not argue against reparations so much as he presents his own list of “reasons” why reparations for slavery “are a bad idea and racist, too”:

1. There is no single group clearly responsible for the crime of slavery
2. There is no one group that benefited exclusively from its fruits
3. Only a tiny minority of white Americans ever owned slaves, and others gave their lives to free them
4. America today is a multi-ethnic nation and most Americans have no connection (direct or indirect) to slavery
5. The historical precedents used to justify the reparations claim do not apply, and the claim itself is based on race not injury
6. The reparations argument is based on the unfounded claim that all African-American descendants of slaves suffer from the economic consequences of slavery and discrimination
7. The reparations claim is one more attempt to turn African-Americans into victims. It sends a damaging message to the African-American community.
8. Reparations to African-Americans have already been paid
9. What about the debt Blacks owe to America?
10. The reparations claim is a separatist idea that sets African-Americans against the nation that gave them freedom<sup>272</sup>

Not all of these “reasons” warrant serious interaction. Horowitz’s (1) and (2) are beside the point—that there are difficulties with identifying wrongdoers is no reason to think Black Americans are not *owed reparations*, and that multiple groups benefitted from human slavery is

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<sup>271</sup> Brophy, *Reparations*, 75.

<sup>272</sup> [Horowitz], “Ten Reasons.” In his original writing, Horowitz used stylized capitalization that did not fit the style of this paper. I have modified his capitalization to fit this document’s style.

no reason to think Black Americans are not *owed reparations*. Item (3) is similarly beside the point—that many white Americans were innocent in terms of whether or not they owned slaves is not reason to think Black Americans are not *owed reparations by some person or entity*.

Number (5) is clearly false—today’s arguments for reparations to the descendants of either human slavery or Jim Crow injustices *are* based on past and present injury. Point (6) is beside the point—that some Black Americans are affluent is no reason to think that other Black Americans (or these affluent Black Americans themselves) are not *owed reparations*. Items (7), (9), and (10) are baseless, border on gas-lighting, and are not reasons to believe that those who were or are wronged are not currently *owed reparations*.

That leaves Horowitz’s (4) and (8) as requiring some answer. Regarding (4), we can ask: is there reason to believe that an American who can plausibly deny culpability in the evils of human slavery or Jim Crow injustices is, then, released from the burden to pay reparations to those to whom reparations are owed; and if there is, is there, then, no debt? And regarding (8), we can ask: is there reason to believe that reparations to Black Americans have already been paid in full? I’ll start with the latter question: a quick look at the racialized economic, health, and education disparities indicates that compensation for past and present racial injustices has not yet been meted out. If the claim is that compensation has been made, and that Black Americans are disadvantaged regardless, we should ask the person who argues against reparations: are Black Americans, then, somehow *inadequate* to the task of succeeding in America?<sup>273</sup> The answer to that question is “no”: there are real barriers in place that have never been sufficiently torn down. Horowitz provides some elaboration to his point (4):

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<sup>273</sup> Brophy mentions “arguments” that Black fatherlessness and drug usage are responsible for these vast racial disparities; see Brophy, *Reparations*. Kendi (2016) and Anderson address these sorts of arguments, and I agree with Kendi and Anderson; see Kendi, *Stamped*, and Anderson, *Imperative of Integration*. It is vastly more plausible that these vast racial disparities are the consequence of racist institutions that systematically disadvantage some groups and advantage others, than that they are the consequence of some defect in Black Americans or Black American culture. Kendi characterizes the arguments from Black fatherlessness and drug use as being racist, and I agree with Kendi on that, too.

The two great waves of American immigration occurred after 1880 and then after 1960. What rationale would require Vietnamese boat people, Russian refuseniks, Iranian refugees, and Armenian victims of the Turkish persecution, Jews, Mexicans, Greeks, or Polish, Hungarian, Cambodian and Korean victims of Communism, to pay reparations to American blacks?<sup>274</sup>

And Brophy provides the reparationist's response to the idea that some American individual, entity, corporation, or government may be absolved of moral responsibility in that way:

But American law has worked out the general principle that taxpayers are liable for the acts of government officials acting under color of law. And corporations—which are really a collection of individual shareholders—are liable for the acts of their employees. In cases of environmental pollution, companies (meaning their shareholders) are frequently held liable for decades following the pollution.... So, it is reasonable—in fact, corporate liability is premised on the idea—that shareholders, even those who had no direct influence on the decisions, have to pay. In the United States, culpability attaches even without fault in many instances. It is natural to expect that corporations—or government bodies—will have liability for the decisions they made, sometimes decades ago.<sup>275</sup>

Reparationists have two responses. First, governmental bodies, like corporations, have a continuing existence. Governments are liable for the judgments issued against them—and, unfortunately, they have to satisfy those judgments with taxpayer money. New immigrants take their new government subject to the liability existing at the time. We all take America with the good and the bad at the same time. There are a lot of opportunities here; so there are some disadvantages. Reparationists' second response is more general. It denies that the people who are claiming innocence actually are innocent. As Professor Ogletree has recently phrased it, "while black folks were sitting at the back of the bus, generations of white immigrants go straight to the front."<sup>276</sup>

Against reparations, George Sher has argued that there is no way for us to know that there *really is* a direct causal chain from a past wrong (like slavery) to the present injustices experienced by marginalized groups.<sup>277</sup> Sher rejects, then, that particular present wrongs can be justifiably thought to have their etiology in some particular distant past wrong (that is, in a particular past wrong committed *by a particular individual*), and Sher rejects the attributability of present-day responsibility for reparations for that past wrong on those grounds. The line of thinking is that the causal connections between past wrongs and present states of affairs are

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<sup>274</sup> [Horowitz], "Ten Reasons," 48.

<sup>275</sup> Brophy, *Reparations*, 78.

<sup>276</sup> Brophy, *Reparations*, 79.

<sup>277</sup> Sher, "Ancient Wrongs."

unknowable, at worst, and underdetermined, at best. Here, Sher is arguing from our epistemological standpoint to the position that we cannot be justified in believing that a particular present-day injustice or racial disparity was ultimately caused by a particular past wrong, and finally to the position that we cannot, then, reliably attribute present-day responsibility for making reparations for those past wrongs. I think Sher is right about many cases—in very many cases, we cannot trace those causal chains all the way back to the original injustice, because we are so epistemologically limited. But in other cases, Sher is wrong. Certainly, we *can* trace moral responsibility and economic disadvantage across history—in very many cases it can be known, indeed, who the descendants are of which former slaves and which slavers. Too, it can be known *which nation or state or corporation* sponsored the slave trade, or implemented red-lining policies, or withheld access to the ballot box, and that knowledge is sufficient for conceiving of particular debts being owed to particular rights-holders by particular nations, states, or corporations.

Note that an inability to trace an unbroken causal chain from some past wrong to some unjust present state of affairs does not preclude reparations, writ large; if it precludes anything at all, it precludes our inability to determine that a particular individual today is accountable for paying another particular individual a direct compensatory payment. But there are very many other forms that reparations could take, and our epistemological limitations do not change the fact that the victim of injustice is *owed*. Were Sher right and were it the case that we cannot reliably attribute moral responsibility to somebody in the present for past wrongs and reparations for those wrongs, it would not follow from *that* that reparations are not owed. I have not argued, and the reparationist does not argue, that *individuals* exclusively are the agents of race reparations; indeed, in the literature surrounding affirmative action policies, legal reforms, and direct compensation to those who have legitimate claim to direct compensation, the State or the corporation are also agents in the rendering of reparations. And we certainly know which State committed American race crimes and benefitted from them, which State legally sanctioned

slavery, and which State legally kept Black Americans from the vote, from home ownership, from access to credit and capital, and so on.

The epistemological worries associated with the matter of reparations make the meting out of reparations *difficult*—it is a matter of fact that we are epistemologically limited and ought to approach the matter with a measure of intellectual humility. It is to be noted that, surely, there are very many wrongs that we can never know about, and that fact will render us incapable of making reparations for at least some wrongs that there were or are. And it is noted that the project of pricing out debts that are owed for past wrongs (and present wrongs) that we *do* know about will be difficult, as will be the projects of determining who exactly is owed what amount and for which particular wrongs. It may well also be the case that once the historians, economists, ethicists, sociologists, and mathematicians have run the numbers on what is owed and to whom, the project of making reparations will be characterizable as *unaffordable*. Be that as it may, that a particular past or present wrong may well be unknowable, that making race reparations is politically and practically difficult, or that direct compensation for past and present wrongs may not fit into the federal government's budget or into the budget of individuals who have inherited another's debt, is no good reason to reject that Black America is *owed* for past wrongs. Even if the amount owed is astronomical, rather than throwing up our hands and imagining ourselves to be in a socio-moral context in which Black Americans are *not actually owed* because the American government or taxpayers *cannot cover the check*, we could conceive of some model of reparations according to which the bill is paid in installments over very many years. After all, the debt as it stands was accumulated in installments over very many years. The moral burden of compensation and reparation is not necessarily that the debt be paid in full all at once; but the debt needs to be paid.

These epistemological and practical difficulties can be resolved the same way we resolve any problem that comes with epistemological and practical difficulty: rigorous research and historical scholarship and meticulous accounting. Indeed, this is Coates's ultimate call to

action: an appeal to dedicated research and investigation.<sup>278</sup> In his case for reparations, Coates observes that in every Congressional session since 1989, the late Representative Conyers introduced legislation to create a commission on the study of reparations for slavery and segregation. Such a commission could potentially bring these epistemological, pragmatic, and political worries to resolution, and at the very least it would elevate the scholarship that has been done regarding the historical problem. In his article, Coates takes this to be a reasonable starting place. Coates does not call for the debt to be paid in full all at once—he only asks for this meaningful starting point.

For the sake of clarity, I will give further attention to the important practical matter of determining who, exactly, should be considered to be owed reparations. As I have said, answering this question comes with epistemological barriers. I should say this, first: the pragmatics of meting out reparations will be characterized by, and will constitute, a necessarily political process. We should, of course, want this process to be informed by principle; but the process *will* be a matter of laws, legal procedures, and imperfect humans judging particular cases and making decisions with limited resources. So, let us begin answering the question *Who exactly is owed?* by offering simple principles that should be widely acceptable:

- i. the reparations process, and judgments about who is owed what, should be *fair* and *impartial*,
- ii. claimants to particular reparations (reparations that are made in addition to broader policy approaches aimed at compensating large numbers of people at once) can be fairly expected to provide some reasonable justification for their claim, and
- iii. states and corporations that know or are presented with their historical liability should engage in the reparations process in good faith and should not wait on

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<sup>278</sup> Coates, “Case for Reparations.”



individual claimants to make their claims before initiating compensation for past and present wrongs and any subsequent disadvantage.

I appeal to the reader's fundamental intuitions about fairness and reasonability: that any legal process should be fair and that for there to be a fair outcome in any dispute reasonability is required from both parties to the dispute. And I acknowledge that those words come with problems, too—What constitutes a *reasonably* justified claim?, for instance, and What constitutes a *fair* process? Since this will be a necessarily political process, I offer that those questions ought to be decided in detail by lawmakers, the commissions of historians and legal experts they form, and impartial monitors of any actualized reparations process.

In my view there will be three varieties of claimants to reparations:

- i. those who were recently directly or structurally wronged
- ii. those who can be determined to be the inheritors of claims to particular compensatory debts owed to long-dead individuals (who were wronged by either some other long-dead person or some long-gone institution)
- iii. living people who were wronged in the distant past either by people (living, or not) or some institution or structural arrangement (still existing or reformed, or not)

So we have as potential claimants to reparations individuals who are wronged today (either directly or as a product of concentrated disadvantage), the descendants of those wronged in the past, and those still living who were wronged at some point in the past. Each has morally legitimate claim to reparations, and would make those claims, corresponding to the sort of wrong associated with their disadvantage—one claim might be in response to some direct hate crime, for instance, and another claim might be in response to a rights-holder's lack of access to credit, and still another claim might include a historical case to compensation for land or opportunity (as in, slavery) that was stolen from the rights-holder's ancestor. To the extent that a rights-holder has been *wronged*, and to the extent that a debt of compensation is owed or to the

extent that access to opportunity can be equalized, claims to such compensation or equal future opportunities can hardly be termed *unreasonable*. States and nations should be conceived of as responsible for implementing policies and reforming laws, such that contemporary structural racial disadvantages (for instance, racist red-lining in mortgage lending) are corrected and compensated for. And it will be up to lawmakers or other impartial officials to work out the legal mechanisms by which reparations can be made to individuals or communities who bring their claims to racial reparations; remedy and compensation for damages is already a feature of the American justice system, and it does not strain plausibility at all to imagine that such a process could be initiated and applied to the race reparations context.

So, who is the proper recipient of reparations? My Wolterstorffian answer: any person who is owed reparations, in the form of either direct compensation or structural reform. By that, I do not mean to offer a tautology—rather, I mean just that teasing out the details of *Who is owed?* is a matter of determining whose worth was disrespected tantamount to the generation of new morally legitimate claims to the life-goods of compensation or reform. This answer purposefully creates a very large set of individuals who are owed race reparations, and surely some of the members of the very large set would surprise those who have argued in the aforementioned ways against reparations. This set would include those who were recently wronged, those who descend from someone who was wronged in the distant past, and those who are still living but were wronged in the distant past. Teasing out the details of particular cases and claims will be inherently political—a matter of process, law, and procedure. In the case of American anti-Black racism and reparations for injustices like the trans-Atlantic slave trade and domestic human chattel slavery, systems would need to be established for the processing of claims to compensation for those debts owed. It would be a set of human processes, including expert deliberation over historical documents, genealogies, and claims to compensation for either particular past wrongs or generalized structural violence.

There are roughly three different sorts of race reparations programs that are relevant in the context of addressing American anti-Black racism:

- i. Compensation for the loss of wages, land, freedom, and life associated with the international slave trade and domestic human slavery. This compensation should be paid either directly to victims or descendants of victims, or to proxy institutions or organizations in cases where the proper recipient cannot be known.
- ii. Reparations owed for the institutionalized and systemic mistreatment of Black Americans and more recently immigrated Black community members, as in Jim Crow laws, voter suppression, redlining, police brutality, and so on. These reparations are paid either in the form of structural reforms or resource reallocations to proxy entities, to be conceived of as owed both *to the Black community as a whole* and to the individuals who comprise that community.
- iii. “Atonement” models of reparations. Atonement is paid to proxy entities in cases where epistemic, genealogical, or historiographical difficulties make it impossible to determine who, exactly, is owed what, but it is clear there remains a debt owed. This also serves the function of providing a space for reconciliation, and it provides the ability for an agent today to unencumber themselves of the sins of their ancestors.

So, the story is not simple. The various types of wrongs that there are warrant conceiving of the reparations project as being a multifaceted, cross-cutting project. There is no simple way of making amends that can handle all the various types of debts that there are and the various epistemic or historical complexities that come with some of those debts.

To show why the various sorts of reparations programs are needed, let’s carefully restrict answering *Who is owed?* to the domain of American anti-Black racism and the particular evil of slavery. The skeptic may ask of the reparationist in this restricted domain: *Will race*

*reparations include every Black person in America, or just the descendants of the enslaved?*

*What about the descendants of the enslaved who are now white or identify as white, and what of the inheritors of debts who are quite affluent even despite the wrongs committed against their ancestors (or against them in the near-past)?* Again, my Wolterstorffian answer: the proper recipient of reparations is any person who is actually owed a debt of compensation or structural reform in light of the past wrong of human chattel slavery, the disrespect for human worth associated with human chattel slavery. So, yes, the descendants of the formerly enslaved are owed compensation for stolen life and stolen labor; and to the extent that someone who is affluent today is owed a debt for the wrongs committed against their enslaved ancestor, then they, too, are owed reparations even despite their affluence. And to the extent that someone today who identifies as white is owed a debt for some wrong committed against their enslaved ancestor, then they, too, are owed reparations even despite their lack of identity with the Black community or despite their not being victim to contemporary anti-Black racism. The debts of compensation associated with human slavery and Jim Crow-style institutional racism should be conceived of as fixed things, indexed to some particular wrong or theft in the past. Some individual's affluence today, or their identity as white, erases neither the original theft nor the debt of compensation owed because of it. And neither does one's conviction that the compensation is unfair (in the case of the white descendent) or unnecessary (in the case of the affluent descendent) undo the past injustice or the claims to compensation that result from it.

For centuries in the American context, intermarriage between races was very rare, and altogether illegal in some states at some times. One consequence of this is that the Black community persisted with a relatively cohesive social identity. This has changed relatively recently, with far greater rates of marriage between members of different ethnic groups and rising rates of multi-racial identification. But still, the isolation of ethnic groups in the American

social context has made identifying who is owed compensation or reform for anti-Black racism a relatively easy task.<sup>279</sup>

We have three options when it comes to acknowledging the epistemic difficulties that come with making judgments about which individuals and which communities are owed for past and present racial wrongs: we can be purists with regard to only rendering reparations to those individuals whose claims can be explicitly verified, we can throw up our hands and not mete out reparations at all in the cases where the set of people who are owed is underdetermined, or we can be reasonably over-permissive with our approach to reparations. I recommend this last option; we should make good-faith efforts at rendering reparations with the understanding in place that it is likely that at least one person will receive a measure of compensation that was not, strictly speaking, owed to them. Just as with any endeavor undertaken by our political community, the reparations process will necessarily be an imperfect political process.

Clearly, talking in particular of *What is owed to whom?* in the context of American human slavery and its legacies will require a careful combing of American history and a case-by-case deliberation of claims to compensation for past racialized direct and structural violence. Just above, I mentioned that a contemporary rights-holder's identifying as white or their affluence should not be taken to cancel debts owed for labor and life that were stolen in the past. But there are further questions: *Is every Black person in America today owed for the wrongs associated with human slavery? What of those who only recently immigrated? Or what of an African American who did not recently immigrate, but who cannot verify a claim to some particular past wrong associated with human slavery?* The answer to those questions is surely "no." But note that answering those questions with "no" does not preclude that these individuals

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<sup>279</sup> Professor Jacob Adler, in a discussion of this paper, observed that racists operated with a "one drop" rule, according to which you were Black and therefore to be subject to horrific treatment if you had just one drop of "Black" blood. This is a potentially useful standard in determining who is owed for past and present racial wrongs—if the political systems and institutions that disadvantaged Black Americans operated by the "one drop" rule, then the political systems and institutions that render reparations for those past wrongs can just as easily use that standard.

may well be owed compensation or reform for some instance of direct or structural racism that obtains today or that obtained in the recent past. *Are all Black people in America owed reparations for the wrongs associated with human slavery?* and *Are all Black people in America owed reparations?* are two different questions with appropriately different answers. There are matters of fact, historical facts, that justify claims to compensation for the evils associated with slavery and, similarly, there are matters of fact from more recent history that surely justify other claims to compensation or reform.

To illustrate the need for proxy group reparations and atonement reparations, we should consider what it means to be the inheritor of a claim to compensation. Take the example of someone who was enslaved for the duration of their life, but who did not have children. *What of the stolen life and labor in that case—is anyone legitimately owed compensation for it?* The compensation cannot be paid to the individual who was wronged or to a particular individual who inherited their claim to compensation—so can it be anyone's duty to pay it? In my view, this case illustrates well an argument for a form of group reparations. Had the individual who was wronged not been so grievously wronged, potentially they would have had a family, a career, participated in civic life, and so forth. Although the compensation cannot be thought to be due to any particular individual, it can still be conceived of as *being due*. And I offer here that this variety of debt of compensation could be paid in the form of investment in entities like Black-owned businesses, investment in predominantly Black institutions like historically Black colleges and universities, or investment in educational and career opportunities for young Black people. These are just examples—ways of conceiving of the massive debts owed to the Black community, in general, in lieu of the possibility of attributing to a particular Black person or family a morally legitimate claim to a particular repayment. In the case of paying compensation for slavery to individuals, we are talking of literal back-pay for stolen labor and life; in the case of paying compensation for slavery to community organizations like schools or businesses, we are talking of what is potentially a form of group back-pay.

We can conceive of at least some debts of compensation—in particular, those that do not fall to a present-day descendant of someone who was wronged in the past—as being legitimately paid out in ways that help to mitigate the sorts of group inequities and structural racial injustices that obtain today. This group back-pay approach is also potentially helpful in our consideration of cases where genealogies and lineages might be impossible to discern—what do we do, for instance, in a case where a perpetrator’s and a victim’s lineages cross, or when it is simply impossible to determine *who* is the inheritor of a past debt or claim (even when we have exhaustive genealogical information)?

One way to make compensation in cases such as these in the context of American slavery and anti-Black racism includes making payments to entities like HBCUs, community-building organizations in predominantly Black neighborhoods, and so on. Whether the difficulty in identifying an individual as the proper payee or recipient is epistemic or genealogical or historiographical, we *can* know that there were grave wrongs committed intentionally against Black people, that these wrongs left a legacy of racialized disadvantage, and that paying compensation to certain schools, businesses, or non-profits would help to alleviate the inequity that obtains today. Payment of compensation to these entities in furtherance of making compensation *at all* is more than symbolic—we can conceive of it as a sort of surrogate reparations or proxy reparations.<sup>280</sup>

Such a model of making compensation also accommodates for atonement. Especially where there is epistemic or historiographical difficulty in identifying which person should be

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<sup>280</sup> Indeed, in the wake of the Holocaust, the German government makes regular reparations to the state of Israel, given the identification of many of the world’s Jews with the state of Israel. This does not replace compensation to individual victims or to their descendants, but it does help to correct for many of the cases of compensation owed that are unknowable. Nearly 20% of Israelis are non-Jewish. And most Israeli Jews are from nations not directly affected by the Holocaust. Still, most of us would say that such payments to Israel continue to be warranted. This is a product of aforementioned difficulties: both the passage of time and the diaspora of individuals across nations and different cultural groups make a precise payment of reparations impossible. But, surely, such difficulties should not preclude the payment of reparations at all. Rendering reparations in this type of way may be imprecise, but rendering reparations imprecisely is certainly more just than failing to render reparations at all. See Rising, “Holocaust survivors” and Timsit, “Blueprint.”

compensated for which wrong, the prolonged desire to make amends can go on without closure. Providing the ability to make amends even given the epistemic difficulties that arise provides both some measure of compensation and some degree of reconciliation between the wrongdoer and the victim and their descendants. Of course, none of these approaches to American race relations should be thought to *replace* the simple form of reparations that takes into consideration the enslavement of a particular Black person and the debt of compensation that is owed to their descendants.

So, independent of whatever legal process can be established for answering claims to compensation for the particular past wrong of slavery, we can conceive of approaches to reparations that cast a wider net than just the arbitration of particular claims that arise from particular past injustices—reparations that are owed *to the community as a whole*, or *to every individual in the community*, in light of disadvantages that obtain as a product of the wrongs or policies that were implemented with the intention to disadvantage the entire community. Earlier in this paper, we discussed policy approaches like affirmative action, which are aimed at forging more representative distributions of power in the market, in classrooms, and in access to opportunity. Anderson argues that integration is the most appropriate response to contemporary racial inequity—the disruption of concentrated disadvantage and the creation of greater access to all forms of capital for those who are currently cut out.<sup>281</sup> I have just mentioned a “group back-pay” approach, in which debts for past wrongs could be paid *via* investment in Black community organizations, Black enterprise, and education and work opportunities for young Black people. History provides the example of Germany’s reparations payments to the nation of Israel and various charitable organizations, as a sort of proxy compensation.<sup>282</sup>

And I suggest one final mode of reparations: that of a universal basic income for members of economically disadvantaged communities. As covered, poverty in our socio-moral

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<sup>281</sup> Anderson, *Imperative of Integration*.

<sup>282</sup> See note 277.



is racialized, and concentrated disadvantage falls along racial lines. In the case of American human slavery and its various legacies, one simple and precedented (albeit politically hazardous) way to create greater group equity (or pay out compensation for past wrongs) is to simply send money regularly to individuals, neighborhoods, or racial group members whose disadvantage can reasonably be thought to be the product of those particular injustices. The goal for such payments should be opportunity equalization and the creation of equity with regard to the distribution of financial capital across different racial groups.

I provide the above list by way of expressing further that the American race reparations (broadly speaking) project is a manifold project, and in my view necessarily so. It is a project that takes into account the full variety of debts of compensation owed to individuals by other individuals, by institutions, and by the state, and it is a project that takes into account the variety of group inequities that have as their etiology some form of structural anti-Black racism. The different sorts of wrongs that there are and the variety of debts owed justify different modes of compensation and reform. The reader simply should not expect for there to be a silver bullet, and the skeptic of reparations should not demand some single approach to this vast array of past wrongs that can sufficiently address every debt owed or every structural injustice that obtains today. Mere compensation does not answer the morally legitimate claims to police reform that arise from instances of police brutality, for instance; and similarly, affirmative action policies do not answer the morally legitimate claim to compensation for decades of stolen life or labor.

#### D. Human Worth & Explanatory Fit

An account of justice that begins with human worth was initially attractive to me for several reasons. First, it offered a simple way to account for the moral considerability of every human being—after all, it is relatively uncontroversial that human beings are morally considerable (though, the various rationales behind that claim are far from being uncontroversial). And as the reader has seen, the task then becomes that of accounting for the

moral considerability of each human, either in a property or capacity an individual has or in some moral entity that supervenes on or is grounded in some property of that individual (like the supervenience of worth on *humanity*, or on other properties). As we have seen, other authors point to human capacities in accounting for human worth, but I agree with Wolterstorff's conclusions that no capacities-account of human worth is immune to counterexamples; inevitably, some rights-holder could be found who lacks the capacity on offer. Wolterstorff and other theists point to the special relation of God to God's human creatures. In my work, I have taken the position that human worth supervenes on *humanity*—so every human has human worth ineradicably, and no non-human has human worth at all, though they may well have some other variety of value.

An account of justice that begins with human worth also does a good job of explaining what has gone wrong in any given instance of racism, direct or structural. It explains the intuitions we have of *wrongness* upon hearing that some individual has been mistreated because of some morally insignificant fact about them, like their skin color. Racism is wrong or immoral, because it is an instance of a thing of a certain kind being treated in ways that are inappropriate as determined by the kind of thing it is and the respect it is owed. Things and beings that are valuable are *due* certain kinds of treatment, and it is jarring when morally considerable objects or persons are treated as common, even when there are no explicit rules regarding the treatment of those valuable things. The question *Why is racism objectively wrong and why is it an injustice?*, even in societies in which racism is legal or normalized, can be answered by appeal to the human worth of the victim of racism and the duties that worth generates regarding their treatment.

I have offered that worth supervenes on humanity and I have gone a step further to offer that human rights then supervene on human worth together with facts about our interests (in individuated socio-moral contexts). Starting with human worth allows us to talk sensibly about the normative force of human rights. There is a normative shortfall when one appeals to strictly

*physical* facts about humans in order to explain human moral significance, and including *worth* as a moral property of ours helps to close that normative gap. That an individual is a human or has that property or set of properties constitutive of *humanity* may be conceivable as being a *reason* for treating an individual in some ways but not others, but only after we have already decided those ways humans *ought and ought not to be treated*. Needed is an appropriate moral starting point—some moral property like *human worth*, or else some moral law or binding set of principles—and I have chosen worth as that explaining entity.<sup>283</sup>

Once it is granted that human rights obtain and that they are relevantly connected to our human worth, and once it is granted that worth lends to the things that have it a normative dimension, we can talk sensibly about those rights dictating the actually normatively forceful rules regarding how we ought to treat other rights-holders and how we ourselves ought to be treated. One might ask, “You have just claimed that deriving normative forcefulness from strictly physical facts is ultimately unsuccessful, so how is positing a supervenience relation of worth on strictly physical facts like *humanity* in order to account for normative forcefulness not also ultimately unsuccessful?” The difference is in my introducing non-natural human worth to account for the normative force of rights—instead of accounting for the moral significance of humans and their rights by appeal to strictly physical facts or capacities, I have accounted for the normative force of rights by appeal to a non-natural moral property, human worth. The moral worth that belongs to humanity gets us a normative starting point; and I take it to be relatively uncontroversial that humans are, in fact, relevantly valuable. Human worth gives human rights-holders their normative aspect; human worth makes human rights-holders morally significant, and it makes certain goods and treatment not just good for them, but also *due* to them. Things

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<sup>283</sup> Or one could reject normativity altogether. But my project is a realist take on worth, rights, and morality. Just as I have rejected the reduction of human moral significance to contingent human capacities and properties, I reject both the reduction of moral facts to physical facts or eliminativism with regard to moral facts.

that lack moral significance, and things of which it cannot be said that certain goods and treatment are *due* to them, are things that lack the requisite worth.

Appealing to objective human worth also provides my account with a way to account for the objective rightness and wrongness, and the objective justice and injustice, of acting in particular ways regarding rights-holders in those contexts in which there are not laws or contracts in place explicitly defining the rights of rights-holders or the just and unjust treatment of rights-holders. Human worth and inherent human rights precede human contract, social contract, divine proclamation, or law; so instances of racism are unjust even in contexts in which racism is sanctioned, because instances of racism are instantiations of disrespect for the objective worth of a rights-holder. (In such a case, the laws or contracts that permit racism are unjust in the structural sense.) Granting that human worth is conceivable as a moral property of humans, worth can provide us with an ontologically real and fixed starting point in our cognizing about the moral and just treatment of people.

So, an appeal to human worth *reifies* the moral significance of humans (but does not necessarily arbitrarily locate us at some apex of moral considerability), and it provides normative force to the claims we make against others in socio-moral contexts. It explains why racism is wrong, even in those socio-moral contexts in which racism is entrenched or sanctioned—justice as ultimately appealing to the treatment that is due to individuals *vis-à-vis* their human worth counts racism as an injustice, because it recognizes instances of racism as being instances of rights-holders being treated in some way other than their objective human worth demands in that context. Starting with the worth every human has ultimately gives us an account that is sensitive to egalitarian intuitions and our intuitions about fairness, and it gives us a way to justify the conviction that every human is an object of serious moral consideration, regardless of non-morally relevant factors like race, gender, disability, religion, sexuality, or economic status. Reparations are a matter of justice, under my view, because justice is ultimately respect for worth, and victims of racial injustice (both contemporary and historical) have legitimate claims

both to compensation for what was taken from them and to existence in a web of social relations in which their *wronged* status will not be perpetuated. And these claims obtain forcefully because the wronged rights-holders have the requisite human worth.

#### E. Conclusion

I have presented a theory of justice that is fundamentally an appeal to human worth and to the normatively binding social relations (rights and their correlative duties) that supervene on that worth together with facts of the matter about those goods and treatment that are life-goods for us. In particular socio-moral contexts humans, in virtue of their tremendous worth, make morally legitimate claims against others to these life-goods. These claim-rights are intrinsically social, because the contexts in which claims are made are necessarily social, and because humans are intrinsically socially situated. That is, a human never finds himself or herself outside of a social situation; human individuals are ever socially situated to other rights-holders and to the relational webs, systems, institutions, and State in which they find themselves.

Individuals can treat rights-holders with the appropriate respect for their worth, or they can disrespect their worth. When an individual treats a rights-holder with proper respect for their worth, she treats him in ways that are consistent with the demands of justice; when an individual treats a rights-holder in a way that disrespects his worth, in violation of the rights that supervene on that worth, she treats him in ways that are inconsistent with the demands of justice. When the rights-holder's claims are not met, she is wronged; when the rights-holder's claims are met, she is treated according to the legitimate grounds for respect she possesses (her worth). The rights-holder's inherent human worth supervenes on certain inalienable properties about that rights-holder, namely the fact of the rights-holder's humanity. One has other rights, too, that are alienable or conferred, in virtue of one's social situation, context, or contingent properties about that individual on which certain worth supervenes. But one's inherent human worth is special, in that one has it inalienably, and it is in virtue of every human's inherent human worth that every human has morally legitimate claims to certain goods and treatment in every social context.

With such an account, we have seen how to evaluate the actions of individuals who harm or withhold some good from rights-holders—that is, in terms of their disrespecting the worth of the rights-holder, thus flouting some right of theirs and the normatively binding social relation they find themselves in to the other. With the work of Rubenstein and Anderson, we gain a way to conceive of justice and injustice in *structural* terms. We gain an understanding of the wrongs and injustices that accumulate in a society not in virtue of the actions of individual moral actors, but rather in virtue of the social structure in which individuals find themselves. Some wrongs are a reliable and predictable output of social structure and asymmetrical power relation. The injustices that are most persistent in our world tend to have these structural forms. Whether or not there is an individual moral actor who is directly responsible for a given instance of disrespect for some rights-holder's worth, that disrespect obtains, and the state of affairs must be considered unjust. Rubenstein and Anderson have provided a language for just such cases—such a state of affairs should be considered *structurally unjust*. Victims of structural injustice in such states of affairs suffer from *concentrated disadvantage* or *structural violence*.

I have tried to establish that, as a matter of fact, the just society is unattainable, when the just society is conceived of in terms of that state of affairs in which no rights-holder is wronged and everybody gets that to which they have morally legitimate claim. However, I have insisted that the justly structured society *can* be actualized—that society in which the State meets its duties to rights-holders, in which the institutions and laws of society serve as no impediment to rights-holders getting that to which they have morally legitimate claim from other rights-holders, and in which the State inserts itself legitimately to right injustices and unacceptable violence. But what of the structural violence that obtains in a given society? In the justly structured society, *the disadvantageous social relations that are permitted to persist (whether direct or structural) manifest only acceptable deficits of somatic and mental realizations*, so the persistence of any *unacceptable* deficit ought to be regarded a *wrong*. In the

previous chapter, I offered my *Principle of Burden* as a decision procedure for determining in which cases the State is duty-bound to correct some wrong or alleviate some bit of suffering.

In the justly structured society, there will be ranges of *acceptable* deficits of somatic and mental realizations. But what of a society like ours—what of the injustices and deficits in contemporary America? So that it is immediately before the reader, here is the Principle of Burden I offered earlier:

- PB:* In any case in which the State is capable of rectifying some instance of violence (whether direct or structural), the State is duty-bound to do so unless:
- i. doing so violates the morally legitimate claims of some *bystander* rights-holder in that context, or
  - ii. doing so would render the State incapable of addressing more egregious cases of violence or some other wrong, or
  - iii. there is some other plausible morally legitimate way of resolving the violence that does not require State intervention, or
  - iv. independent of conditions i–iii, the deficit of somatic and mental realizations is *unavoidable* relative to the particular socio-moral context.

When conditions (i) or (ii) are met, I conceive of that State as being obligated *not* to intervene; when (iii) or (iv) are met, the State is simply *not* obligated to take action, although its action would be *good*. Add this to the elements of the justly structured society I introduced earlier, where such a society is structured:

- i. in such a way that persons *can be* rendered all of that to which they have morally legitimate claim by other members in the moral community,
- ii. in such a way that persons *are* rendered all that which they are owed by the State and other public institutions, and
- iii. in such a way that persons *are* protected by enforceable laws from actions of others who would demean them or withhold from them their right.

Recall that (i) is a necessary condition of the justly structured society because it is necessary that the systems, institutions, founding documents, etc., of a society are not such that they actively preclude the fulfillment of the morally legitimate claims that obtain between rights-holders. Element (ii) is a necessary condition of the justly structured society because a society in which the *State itself* does not fulfill its morally legitimate duties to the rights-holders over which it is sovereign (as in, its duties to provide clean water to everyone, or a basic mode of health care) could hardly be conceived of as justly structured. And (iii) is a necessary condition of the justly structured society because there are very many cases of a rights-holder's rights being violated in which the State should step in to right the wrong, alleviate the suffering caused, and bring any wrongdoer to justice. A combination of these necessary conditions and my Principle of Burden helps to flesh out the necessary conditions of the justly structured society.

Under the criteria that I have laid out for the just society and the justly structured society, I take it to be uncontroversially clear that our liberal democracy in the United States is not only unjust (which can be said of every society that exists), but also structurally unjust. That is not to say that our society is unique with regard to my characterization of it as being structurally unjust—probably, all societies on our planet are structurally unjust, and in fact the United States is better off than most. But in our society clear and glaring deficits of somatic and mental realizations obtain, even in just the one domain of structured race relations.

Take the experience of Black America, for example, a community whose status is traditionally and currently that of *wronged*. From police violence against the African American community,<sup>284</sup> to education performance gaps between the students of racially segregated schools and neighborhoods,<sup>285</sup> to the relative lack of access to good credit,<sup>286</sup> and healthy

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<sup>284</sup> See Tate, Jenkins, and Rich, "Fatal Force."

<sup>285</sup> See Rothstein, *Racial Achievement Gap*.

<sup>286</sup> Streaks, "Black families."



food<sup>287</sup>—it is clear that the community members of Black America are victim to concentrated disadvantage, and Elizabeth Anderson’s work alongside others makes the case powerfully for anyone who is in doubt.<sup>288</sup> The social arrangements in which Black Americans find themselves are *unjust* and *structurally unjust*; that is, Black Americans are frequently wronged interpersonally, as a product of the way our social systems and institutions are arranged (racialized disparities in access to clean drinking water or racialized disparities in criminal conviction and sentencing in our criminal justice system),<sup>289</sup> or in some combination of the two (as in instances of police brutality). As a product of the way our social relations have long been structured and are currently structured, rights-holders in the Black community are routinely withheld that to which they have morally legitimate claim and these instances of disrespect for Black rights-holders’ inherent worth do real harm and generate new claims to corrective justice and compensation.

It is clear why this is a form of structural injustice. Many of these wrongs are a product of social structures and relations, and of the way certain systems and institutions have the effect of disadvantaging some communities relative to others. Individuals who belong to groups that are routinely disadvantaged suffer from deficits of somatic and mental realizations and in many cases (as when a Black child is denied the kind of quality of education that the White child who lives just across town benefits from) these social relations should be conceived of as *wronging* the rights-holder.

Do American social arrangements in the particular domain of American race relations meet my original three criteria for the justly structured society? No. It does not obtain for every citizen in America that (i) our society is structured in such a way that persons *can be* rendered all of that to which they have morally legitimate claim by other members in the moral community.

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<sup>287</sup> Brones, “Food Apartheid.”

<sup>288</sup> In addition to Anderson, *Imperative of Integration*, see Anderson, *White Rage*; Kendi, *Stamped*; and Coates, *Between the World and Me*.

<sup>289</sup> Regarding access to clean drinking water, see Denchak, “Flint Water Crisis.” Regarding conviction and sentencing rates, see The Sentencing Project, *Report*.

That is, it is false that there are no institutional barriers to every Black American (for example) receiving all of that to which they have morally legitimate claim from other rights-holders and from the State and various other public systems and institutions; Anderson's work on the effects of segregation and concentrated disadvantage, for example, reveals how institutionalized racial segregation keeps rights-holders of different races apart spatially, cutting off access to the political, social, cultural, and financial capital held by more affluent rights-holders.<sup>290</sup> This spatial separation restricts opportunity for Black Americans and it cuts Black Americans off from the social spaces in which the systemically advantaged find access to capital and opportunity.

And it does not obtain for every citizen in America that (ii) our society is structured in such a way that persons *are* rendered all that which they are owed by the State and other public institutions. The United States government, state governments, and local municipalities have been historically numb to the interests of Black America and other ethnic minority groups. The State is duty-bound, by the ineradicable worth of Black Americans, to provide Black Americans with the same kind of clean water that more affluent communities have access to, with the same kind of police protection that affluent communities have had access to, with the same kind of health care and nutrition opportunities that more affluent neighborhoods have access to, and with the same quality education that white kids across town have access to. In as much as the State owes these things to every member of its society, these things are *due* Black Americans by the State, in virtue of the ineradicable worth of Black Americans—but inequalities in access to each of these public goods obtains nationally and locally. In those inequalities, and in the deficits that result, we see wrongs.

And, finally, it does not obtain for every citizen in America that (iii) our society is structured in such a way that persons *are* protected by enforceable laws from actions of others who would demean them or withhold from them their right. In the United States, there are laws in place that protect rights-holders from discrimination and being unjustly wronged by other

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<sup>290</sup> Anderson, *Imperative of Integration*.

rights-holders, and there is a justice system that to some degree sets such wrongs right, but the justice system is enforced without racial equity and entire institutions within the American justice system were designed and are perpetuated in such a way that disadvantage is meted out to the people of color under their jurisdiction. None of this is to say that *some people* in the United States do not know *justice*; indeed, if you are racially and economically privileged in our society, one could hardly blame you for thinking that you live in a structurally just society. The structure, after all, works well for you, though certainly you know of the injustices that befall others. But that there are entire swathes of rights-holders who are either directly wronged by the State or who are indirectly disadvantaged by standing social and institutional relations indicates that not everyone in our society experiences structural justice. So, our society is best conceived of as structurally unjust.

Further, our society is far from meeting the dictates of the Principle of Burden I offered. The hands of our liberal democracy are hardly tied, when it comes to the State intervening to set right certain wrongs. Many of the egregious wrongs in our society are such that the State could intervene and do justice—and ought to. The State is duty-bound, for instance, to intervene in cases of racial inequity in education funding, but in many cases it does not. The disparity in education funding by race is striking.<sup>291</sup> And, presumably, the State could right the vast array of wrongs associated with these disparities without (i) violating anybody's morally legitimate claims, without (ii) making the State incapable of preventing some other wrong, and without (iii) doing so unnecessarily or wastefully on grounds that some other agent or institution could or should intervene. And, presumably, it is false that (iv) the deficit of somatic and mental realizations caused by school water that has toxic chemicals in it is an *acceptable* deficit. Surely, for example, given our social context and massive national wealth it is a reasonable moral expectation that the State make provision for ensuring that every public school child be able to drink nonhazardous water at his or her school and have access to updated textbooks.

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<sup>291</sup> Lombardo, "White School Districts."

So, it is not as if the structural injustices that persist in our society are such that the State is unable or morally obligated *not* to address them. Many of the structural injustices that obtain are such that the State is *obligated* to address them, but simply does not.

In a liberal democracy like ours, the problem of the persistence of structural injustice is fundamentally a collective action problem. The resolution of the structural injustice and structural violence over which public policy has some say is a matter of political will. In a representative democracy, rights-holders vote for leaders to represent their values, priorities, and interests in government, and these leaders write policy and are held accountable for their work in the next election. So, in a liberal democracy, the conversation about the State's duties to rights-holders is a conversation about the complex moral weave constituted both by the duties of office of those in elected office and in the public service sector to those who have been wronged, and by the duties of individual rights-holders to those who have been wronged to vote in particular ways and to pressure law-makers to address systemic wrongs.

Our normatively binding social relations are constituted by claims against our moral interlocutors—I have legitimate claim to being treated in certain ways but not others, and those claims tug at the rights-holders around me. I have morally legitimate claims to not being unjustly physically assaulted by officers of the State—those claims pull at individual officers of the State, they pull at those who determine law enforcement policy implementation, they pull at those with the power to rewrite law enforcement policy, and they pull at those with the power to vote or work politically and socially to install new leaders. When an injustice like police brutality happens and then persists, individual officers have wronged the victim, leaders of the institutions in our justice system have wronged the victim, policy makers with the ability to rewrite the laws that govern our justice system have wronged the victim, and those who are able to (but who do not) exercise their political agency in service of reforming the justice system so that police brutality no longer persists have wronged the victim. We have failed, individually and collectively, to act with proper respect for the worth of the individual who has been wronged.

When an officer of the State brutalizes someone unjustly, that is clearly an injustice, and it is easy to locate the point of violation of the victim's set of morally legitimate claims against the officer. When law enforcement policy is such that it systemically disadvantages some communities and not others, members of a society have obligations to those wronged individuals and to disadvantaged groups to work politically and socially to correct the structural injustice. In such a case, the injustice is *structural*, in that it is a reliable and predictable outcome of the way our society's institutions and systems have been arranged to the detriment of those who typically fall victim to police brutality or mass incarceration or over-policing, but the individuals whose worth is being disrespected make their claims against us to our participating *as individuals* in society in such a way that their worth will no longer be disrespected by policymakers, institutions, and officers of the State.

Our moral relations are the web of social relations in which we find ourselves; legitimate claims obtain between the victim of injustice and each of the moral actors to whom or to which the victim of injustice is socially situated. In a liberal democracy, rights-holders have agency in determining social structure and relations; intrinsically socially situated as we are, our political decision-making within these webs of social relations ought to be informed by the legitimate claims others make upon us, both to our immediate treatment of them and to our activity as intrinsically social political agents who (collectively) can determine the extent to which the worth of the rights-holders around us is either respected or disrespected by *system, institution, and State*. When I vote for the candidate with the policy ideas that will wrong African Americans, for example, it is not as if I directly wrong African Americans in the same way the racist political leader wrongs African Americans; but I *do* wrong African Americans in voting so, the wrong being indexed to the morally legitimate claims of African Americans against me to act politically in ways that further their betterment or preclude their abuse, all other things being equal.

There are some goods that only the State and its collective resources can be reasonably expected to provide—for example, public safety services. That some neighborhoods are not

provided with adequate fire safety services, for instance, is nothing I can directly correct (unless I have incredible wealth). That is, I have no duty to provide that neighborhood with fire safety services; and, certainly, if you live in a state or city far away from that wronged neighborhood and your political decisions could not possibly affect them, then you have no duty whatsoever to them regarding their lack of access to fire services. But imagine that you live in the same legislative district or town as this wronged community—you have duties, if not to becoming a volunteer firefighter, then perhaps to contacting your representative or mayor to have them address the wrong, to raising awareness to this public safety hazard, etc. So, that the residents of this neighborhood are wronged by some structural injustice does not entail that you are guilty in the same sense that, say, the people who have directly mismanaged that city's resources are guilty, but the residents of that neighborhood do have morally legitimate claim on you to your advocacy. In a liberal democracy like ours, the resolution of structural injustice lies in the direction of collective political action, the aim being to reform unjust social structures, institutions, and systems.

We are intrinsically socially situated and individually and collectively we ought to respond to the morally legitimate claims of those who take up the socio-moral space around us. Past wrongs, when not addressed, accumulate today in standing inequitable power relations and (for some Americans but not others) closed lines to different varieties of capital. The only way to address an accumulation of past wrongs that disadvantages some and advantages others is by answering the morally legitimate claims generated by those wrongs: direct compensatory reparations, and structural reparations in the form of policy and structural reform. In as much as we can quantify the debts that are owed to those rights-holders around us in virtue of past wrongs, we should answer those rights-holder's claims and pay those debts; and in as much as we can arrange our social relations and institutions so as to eliminate the structural violence that is foisted on some Americans but not others according to factors like race, we have duties to act

collectively to do so. Justice is respect for human worth, and answering these claims is what respect for human worth demands.

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